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No. 86-959

In The

Supreme Court of the United States

October Term, 1986

KELLY FALOONA and BRANDON FALOONA, by their next friend, LINDA FREDRICKSON,

Petitioners,

v.

HUSTLER MAGAZINE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Do minors have a right to a jury determination as to whether their right to privacy has been violated when their nude photographs appear in a sex magazine?

2. Do parents have the power to consent to the photographing and publication of photographs of their nude minor children in sex magazines?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were the Petitioners, KELLY FALOONA and BRANDON FALOONA, by their next friend, LINDA FREDRICKSON, and the Respondent, HUSTLER MAGAZINE, INC.

Respondent, HUSTLER MAGAZINE, INC., is a wholly-owned subsidiary of Larry Flynt Publications, Inc.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, KELLY FALOONA and BRANDON FALOONA, by their next friend, LINDA FREDRICKSON, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on September 15, 1986.

OPINIONS BELOW

The order denying Plaintiffs' Motion for Partial Summary Judgment is reprinted in the appendix hereto.

App. 1. The Memorandum Opinion of the United States District Court for the Northern District of Texas, Dallas Division (Buchmeyer, D.J.) is reported at 607 F.Supp. 1341, and is reprinted in the appendix hereto. App. 2.

The opinion of the Court of Appeals for the Fifth Circuit is reported at 799 F.2d 1000, and is reprinted in the appendix hereto. App. 47. The judgment of the Court of Appeals for the Fifth Circuit is reprinted in the appendix hereto. App. 64. The order denying the Suggestion for Rehearing En Banc and denying panel petition for rehearing is reprinted in the appendix hereto. App. 65.

JURISDICTION

Invoking federal diversity jurisdiction under 28 U.S.C. § 1332, Petitioners brought this suit on January 17, 1979, in the Northern District of Texas. On May 2, 1985, the District Court granted a summary judgment in favor of Respondent HUSTLER by dismissing this cause and denied Petitioners' CHILDREN'S Motion for Partial Summary Judgment. *See* App. 2.

On the CHILDREN'S appeal, the Fifth Circuit, on September 15, 1986, entered a judgment affirming the District Court's dismissal of the CHILDREN'S claims against HUSTLER. *See* App. 64.

The CHILDREN'S Suggestion for Reharing En Banc was treated by the Panel of the Fifth Circuit as a Petition for Rehearing and was denied on October 14, 1986. *See* App. 65.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in the Court Below.

On January 17, 1979, Kelly Faloona and Brandon Faloona, by their next friend, Linda Fredrickson, filed suit against Hustler Magazine, Inc. for violating their rights to privacy. On May 2, 1985, the District Court granted summary judgment for HUSTLER. App. 2. The United States Court of Appeals for the Fifth Circuit affirmed the judgment on September 15, 1986. App. 47.

(ii) Statement of Facts.

The CHILDREN'S parents were divorced in 1972 in California and the mother, LINDA FREDRICKSON, was awarded custody. (D.Ex. 1; R. 1456). In approximately August, 1972, the CHILDREN'S mother first heard of *The Sex Atlas*, which was to be an educational, textbook encyclopedia for libraries, medical schools and doctor's offices (L.F. III, 5-6). A photographer and Methodist minister, Dr. Laird Sutton, asked her to help with some needed photographs of nude children. (L.F. I, 77-78; III, 18). He represented that the photographs would be used only in *The Sex Atlas* (L.F. I, 83, 86). These photographs were taken in September, 1972, but never appeared in any publications (L.F. I, 88; III, 4). Dr. Sutton later asked the mother for a second set of photographs of the nude CHILDREN which were taken in approximately March, 1973 (L.F. III, 4). Again, Dr. Sutton represented that the photographs would be used only in *The Sex Atlas* (L.F. I, 92-93; II, 18-19; III, 6-9, 13). The mother trusted him as a minister (L.F. III, 14). At this time, Kelly was 7 and Brandon was 5 years old. On August 2, 1973, without receiving any money or other consideration, the mother

signed a release for the second set of photographs of the nude CHILDREN (L.F. III, 4-6; D.Ex. 2; R. 1458), at a time before *Hustler* was even being published. In December, 1977, prior to the publication of the photographs of the CHILDREN in *Hustler,* the mother went to the National Sex Forum and told them that the photographs were not to be used (L.F. I, 101-103; III, 28). In October, 1978, while at a Sunday barbeque with friends, the CHILDREN were confronted with their nude photographs in the November, 1978 issue of *Hustler* (L.F. I, 119; K.F. [7-81] 24; B.F. [7-81] 18; P.Ex. 1, p.33). A telegram was immediately sent to HUSTLER on October 25, 1978, advising that no lawful permission existed for the publication of the CHILDREN'S photographs and there should be no further publication of their photographs (P.Ex. 7). HUSTLER received the telegram, but neither replied to nor complied with the telegram (R. 1230, 1232, 1288, 1289).

Thereafter, HUSTLER again published photographs of the nude CHILDREN in its December, 1978 issue of *Hustler* (P.Ex. 2, p.73). The CHILDREN suffered fear, shame, anguish, depression and anger from this resulting in psychological treatment by Dr. Jeffrey C. Siegel (J.S. 50-133).

HUSTLER readily admits that its significant and primary purpose is to provide fodder for masturbatory fantasies and sexually "get off" its readers (P.Ex. 288, p.3), and that it accomplishes its purpose which is pure, unadulterated sex (P.Ex. 288, p.5). HUSTLER recognizes that it should not publish nude photographs of children (P.Ex. 13), but it, nonetheless, does continue to publish nude photographs of children (P Ex. 14, 15 (p.3), 16-20).

HUSTLER recognizes that its pedophile readers want photographs of young children and it does all it can to comply (P.Ex. 31-37). Even HUSTLER admits that parents sell their children into pornography (P.Ex. 107). HUSTLER has never sought nor obtained court approval for any photographs of a minor it has published (R. 1440). HUSTLER had no knowledge of the release signed by the mother until her deposition was taken in this case (R. 495-498; J. p.2-3; K. p.24).

HUSTLER printed approximately 2,000,000 copies each of the November and December, 1978 issues and has sold approximately 1,500,000 of each containing the photographs of the nude CHILDREN, and in fact, continues to the present time to sell these two issues containing the photographs of the nude CHILDREN (R. 1430-1431, 1443-1445).

The CHILDREN have repeatedly pointed out that all applicable law, whether it be Texas, California (which the Fifth Circuit ultimately applied) or federal law, clearly requires judicial approval before rights of children may be released and their nude photographs taken and published; however, the Fifth Circuit declared that they are unwilling to pronounce that "California law requires judicial approval of photographic releases for use of minors' photographs in a magazine such as *Hustler.*" *See* App. 59. The Fifth Circuit also held that the CHILDREN'S rights to privacy had not been violated as a matter of law. App. 60-63. These holdings were made even though the District Court found *Hustler* to be, among other things, "a 'hardcore' men's magazine," "a coarse and sex-centered magazine" and "*just plain ravnchy.*" App. 6. *See* Kov-

ner, *Recent Developments in Intrusion, Private Facts, False Light, and Commercialization Claims,* COMMUNICATIONS LAW 1986, P. L. I., Vol. II, p. 7, 73. That same District Court, six days later, characterized *Hustler* as a "hard-core skin magazine" containing "sleaze and unmitigated raunch." *Wagner v. Thomas,* 608 F. Supp. 1095, 1097, n. 7 (D.C. Tex. 1985).

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REASONS FOR GRANTING THE WRIT

I.

The Decision Below Deprives Minors Of Their Right To Privacy; A Right This Court Has Observed To Be "Forceful". New York v. Ferber, 458 U.S. 747, 759, n. 10 (1982).

The CHILDREN have argued throughout that the privacy rights of children should be governed, at the very least, by the same standard as an adult. In fact, it has long been the law that more protective standards are afforded children.

> Why should the landowner be put under such obligation to children and parents? What is the policy behind such a duty? Here we are asking a question the answer to which is too frequently assumed as being perfectly clear to everyone, or else it is so difficult to reduce to statement that we seldom make the attempt . . . children are vital to our way of life. Their physical welfare is worthy of the law's protection. When any person's activities too severely prejudice their welfare we may expect government to take a hand. Green, *Landowners Responsibility to Children,* 27 Tex. L. Rev. 1, 12 (1948).

The above philosophy has recently been reiterated by this Court in its unanimous decision on child pornography:

> A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.

New York v. Ferber, 458 U.S. 747, 757 (1982) (hereinafter cited as "*Ferber*"). This Court has made it clear that a child's privacy rights are the primary consideration *vis-a-vis* general constitutional considerations. *Ferber, supra* p. 759, n. 10. This Court cited examples of the different standards applied to children. *Id.* pp. 756 and 757.

The courts below distinguished *Ferber* by stating that it involved a criminal statute and that the photographs at issue were of a "sexual performance". App. 31 n. 44 and 57 n. 1. However, such a distinction ignores the obvious. First, this Court would have no doubt taken a stronger position had the case involved the civil privacy rights of children without the need to weigh the constitutional rights of an accused in a criminal case. Second, the photograph at issue in *Ferber* was of "young boys masturbating". *Ferber, supra* p. 747. While not masturbating, the photograph in the November, 1978 issue of *Hustler* does depict the touching of the genitals. Third, the photographs in *Hustler* does constitute child pornography. *See United States v. Nemuras,* 567 F. Supp. 87 (D.C. Maryland 1983), *affirmed* 740 F.2d 286 (4th Cir. 1984). There the court noted that a picture in a textbook may not be pornography and yet out of that context could violate federal law in another use. *Id.* p. 89.

II.

The Decision Below Takes Away A Minor's Right To A Jury Trial On The Issue Of Whether The Nude Photograph Of A Child In A Sex Magazine Placed That Child In A False Light And Is In Conflict With The Seventh Circuit.

The Fifth Circuit's opinion is in conflict with the Seventh Circuit. *Douglass v. Hustler Magazine,* 769 F.2d 1128 (7th Cir. 1985), *cert. denied,* — U.S. —, 106 S. Ct. 1489, 89 L.Ed.2d 892 (1986). There the Seventh Circuit held that context is important, which is in accordance with this Court (*Ferber, supra* p. 755), the Fifth Circuit (*Braun v. Flynt,* 726 F.2d 245, 253, 254 (5th Cir.) *reh'g en banc denied,* 731 F.2d 1025, *cert. denied sub nom., Chic Magazine, Inc. v. Braun,* 469 U.S. 883 (1982)), and the district court below (App. 34). The conflict between *Douglass* and this case has already been recognized. Kovner, *Recent Developments in Intrusion, Private Facts, False Light, and Commercialization Claims,* COMMUNICATIONS LAW 1986, P. L. I., Vol. II, p. 7, 73.

The CHILDREN have, for over 7½ years, asked only to be allowed a jury trial wherein the "textbook" (App. 47) in which their photographs first appeared could be compared to *Hustler.* This has not been an unreasonable request since *Douglass* held that it was proper for the jury to compare *Playboy* to *Hustler. Douglass v. Hustler, supra* p. 1137. That case involved the nude photograph of an actress who had posed nude on numerous other occasions in *Playboy. Id.* p. 1137. At no time has HUSTLER or any of the courts below put forth any reason why adults should have greater access to a jury than children.

The Fifth Circuit's opinion is also a radical departure from its own prior holdings and mainstream privacy law. A new and onerous standard has now been created for children.

The opinion below ignores *Braun v. Flynt.* That case involved an adult woman in a swimsuit and the Fifth Circuit there held:

(a) Ms. Braun, like the CHILDREN, was not a public figure and therefore *Chic* was not entitled to the protection of the first amendment. *Braun v. Flynt, supra* p. 250. Consequently, there is no "serious first amendment issue" as stated in footnote 2 of the Fifth Circuit's decision. App. 60 n. 2.

(b) Ms. Braun did not relinquish the above by performing in public as an entertainer. *Braun v. Flynt, supra,* p. 250.

(c) Questions of whether a publication places the plaintiff in a false light is a question of fact. *Id.* p. 253.

(d) When considering the context of a magazine like *Chic* which is "a glossy over-sized hardcore men's magazine" (*Id.* p. 247) the jury was properly allowed to consider the entire magazine. *Id.* p. 254.

(e) The readership of a "glossy over-sized, hardcore men's magazine" is an important consideration. *Id.* p. 248 n. 1.

(f) While not discussed specifically, the fact that Ms. Braun signed a release did not prevent her recovery on the jury verdict. *Id.* p. 247.

The Court's decision also ignores *Wood v. Hustler Magazine,* 736 F.2d 1084 (5th Cir. 1984), *cert. denied,* 469 U.S. 1107 (1985) as follows:

(a) The court's discussion of the constitutional ramification of holding for the plaintiff again shows a total lack of a "serious first amendment issue". *Wood v. Hustler Magazine, supra* pp. 1090-1093. This would be all the more true when weighing the interests of children. *Ferber, supra* p. 759 n. 10.

(b) The Court held that Hustler was not permitted to rely on a release executed without authority. *Wood v. Hustler Magazine, supra* pp. 1092-1093.

Why should children be denied a jury determination comparing the textbook to the sex magazine? The decisions below are setting dangerous precedent for the sanctioned use of nude children in sex magazines and movies. The question must be asked, why? There is no literary value in exhibiting the genitals of children. *Ferber, supra* p. 762.

III.

The Decision Below Removes Fundamental Protections For Minors And Allows Them To Be Sexually Exploited By Sex Magazines And Other Distributors Of Sexual Materials.

IV.

The Decision Below That Parents May Allow Photographs Of Their Nude Children To Be Taken And Published In Sex Magazines Is In Direct Conflict With All American Judicial Systems Requiring Judicial Approval Before Substantial Rights Of Minors Are Released.

A. Sexual Exploitation Of Minors.

In July, 1986, the Attorney General's Commission on Pornography was publishing its Final Report, documenting the abuse of children by pornographers and recommending numerous policies and laws to be implemented to protect children. At virtually the same time in this case, the Fifth Circuit was removing a vital safeguard for children in their protection from being sexually exploited. The

Commission recognized that material is pornographic if it is predominantly sexually explicit and intended primarily for the purpose of sexual arousal. *Attorney General's Commission on Pornography — Final Report,* 1986 (Vol. I, p. 228) (hereinafter the "*Report*"). HUSTLER brags that its publication is for these very purposes. The *Report* further recognizes that parents are involved in this illegal activity (*Report, supra* at Vol. I, p. 416, n. 79), and it is even the parents who sell their own children into pornography (*Report, supra* at Vol. I, p. 601). Again, HUSTLER readily admits this. The *Report* documents that the harm to children is virtually unanimously considered to be extraordinarily serious, and the possibility of consent is something that the law has long considered, and properly so, to be an impossibility. *Report, supra* at Vol. I, p. 412. And yet, the Fifth Circuit has now held that this impossibility of consent may be given by a parent and the minor children will have no recourse from the extraordinarily serious harm that has been committed on them.

The *Report* recognizes that minors deserve special protection from the risk inherent in the production of pornographic materials, and producers, such as HUSTLER, should be required to obtain proof of the age of the performer and record the age on a signed release form to verify that minors are not being used. *Report, supra* at Vol. I, pp. 618-620. The *Report* further recognizes that even persons who are legally adults at age 18 still need protection and recommends legislation preventing the use of anyone under the age of 21 in sexually explicit visual depictions. *Report, supra* at Vol. I, pp. 623-24. In fact, the Pornography Victims Protection Act has been intro-

duced which would allow an injured child to recover damages from producers and distributors in a federal civil action. *Report, supra* at Vol. I, p. 720, n. 682.

The Attorney General's Commission on Pornography repeatedly recognizes the vulnerability and serious harm done to children by being photographed and placed in sexually explicit material. Additional protection and safeguards are warranted and recommended. However, the Fifth Circuit has removed one current protection for children in holding that parents, for whatever purpose, can permit photographs of their nude children to be published in sex magazines and release their children's rights for this wrong. This protection of minors must be reinstated immediately.

B. Consent By Parent Is Not Effective.

As previously cited, the *Report* recognized that consent by a minor to be photographed in the nude is an impossibility. *Report, supra* at Vol. I, p. 412. It has been fundamental and basic law that parents stand in no special position to waive any of the rights or causes of action of their children. California law is clear on this and is in accord with all other state and federal jurisdictions on this point. The Fifth Circuit did not address and is in direct conflict with *Celli v. Sports Car Club of America, Inc.*, 29 Cal. App. 3d 511, 105 Cal. Rptr. 904, 908 (Ct. of App. 1972). The *Celli* case involved a release which was signed by both the father and his minor child upon entering a race track. *Subsequently,* the child was injured at the racetrack. The Defendant asserted the release as a defense because it had been signed by the child and his father. The court held that the release was not effective and could be disaffirmed

by the child by simply filing the cause of action. This same principal for protection of minors applies whether the injury occurs from a later racecar accident or from a later publication of nude photographs. The child and the parent cannot give a valid release without court approval. The Fifth Circuit was bound by the *Celli* decision and a direct conflict exists. *Taylor v. Jim Walter Corp.*, 731 F.2d 266, 267 (5th Cir. 1984); *Birmingham Fire Ins. Co. of Pennsylvania v. Winegardner & Hammons, Inc.*, 714 F.2d 548, 550 (5th Cir. 1983). The purpose for and necessity of judicial scrutiny and sanction before a release is binding on minors is stated in *Salmeron v. United States,* 724 F.2d 1357, 1363-1364 (9th Cir. 1983). Although involving federal law in *Salmeron,* the basic protection of minors as established by California and all other state courts is uniform. This Court has recognized the uniformity with which all states require courts to determine and put a child's best interest first, even where parents' private agreements are involved. *Ford v. Ford,* 371 U.S. 187, 193-194 (1962). Public policy will not allow or encourage photographs of nude minors in sex magazines such as *Hustler.* The *Report* recognizes that children should receive legal counsel and guardian ad litem to protect and assist them. *Report, supra* at Vol I, p. 717.

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CONCLUSION

The severe and permanent psychological harm done to children by being photographed and placed in sexually explicit magazines is well known. As documented by the *Attorney General's Commission on Pornography—Final Report*, society must increase, not decrease, its protection of its children. The decisions below remove the primary safeguards for children. This Court should immediately reinstate that protection. If the use of nude children in sex magazines and movies is to be allowed, then, at the very least, judicial approval should be required. Likewise, this Court should make it clear to all those who would publish the nude photographs of children that they are trespassing on the children's rights to privacy for which children have a remedy; a remedy we have accorded adults. The decision of this Court should be swift and strong so that all producers and distributors of sex materials will know that they will no longer have the shield of adult consent when pandering child pornography.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-79-0056-R

KELLY FALOONA and BRANDON FALOONA,
by their next friend, LINDA FREDRICKSON,

Plaintiffs,

VS.

HUSTLER MAGAZINE, INC.,

Defendant.

ORDER

(Filed Jan. 11, 1984)

Plaintiffs' Motion for Partial Summary Judgment is DENIED. Defendant's Motion for Summary Judgment will be granted in accordance with a forthcoming opinion.

SIGNED this 11th day of January, 1984.

/s/ Jerry Buchmeyer
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-79-0056-R

KELLY FALOONA and BRANDON FALOONA,
by their next friend,
LINDA FREDRICKSON,

Plaintiffs,

v.

HUSTLER MAGAZINE, INC.,

Defendant.

MEMORANDUM OPINION

(Filed May 2, 1985)

This right of privacy suit involves the publication of nude pictures of the plaintiffs in two issues of *Hustler*.

1. INTRODUCTION

The plaintiffs, Kelly and Brandon Faloona, are both minors. They are sister and brother, and were only seven and five when the nude photographs were made.[1] They are joined in this suit by their mother, Linda Fredrickson, as

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[1]Nude pictures of the plaintiffs were made on two separate occasions. The first time, Kelly was six and Brandon was four; the second time Kelly was seven and Brandon was five. The nude pictures were published in *Hustler* five years later, when Kelly was twelve and Brandon was ten. They are now seventeen and fifteen.

"their next friend" and guardian ad litem.[2] Together, the minor plaintiffs and their mother/next friend make the rather dramatic claim that this:

> ". . . is potentially a landmark case and stands on the threshold of ushering in the formal announcement of a standard of care for *skin magazines desiring to use the photographs of nude children*, that standard being that they *must first obtain court approval. It cannot be left to parents since*, in the area of child pornography, *it is often the parent who sells the child into this sickness.* SICKNESS FOR SALE, p. 20; *Hustler*, September, 1977, pp. 85-86. Consequently, if parental consent were enough, a large number of our children would be denied a remedy against those who would publish and exploit their photographs for profit." (emphasis added.)[3]

The nude pictures of the minor plaintiffs were—*with the consent of their mother/next friend, Linda Fredrickson*—first published in 1977, when Kelly was eleven and Brandon was nine. Although the nude photographs of the plaintiffs merely depicted the bodies and genitals of young children,[4] there were numerous other pictures and drawings in this publication which were sexually explicit and often erotic—bare breasts and nude bodies of attractive women,

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[2]On January 17, 1979, this Court signed an order requested by the mother/next friend, Linda Fredrickson, which appointed her as guardian ad litem for the purpose of instituting this action for her two minor children (who were then twelve and ten).

[3]Plaintiffs' Trial Brief, p. 12.

[4]The nude pictures of the plaintiffs are *not* "child pornography" under *New York v. Ferber*, 102 S. Ct. 3348, 3358 (1982), because they do not show the plaintiffs engaged in any sexual activity or in a lewd exhibition of their genitals.

female genitalia, male sex organs (both erect and flacid), foreplay (fondling of breasts and genitals), intercourse between a male and female (both implicit and explicit), and various acts of oral sex by men and women (explicit fellatio and cunnilingus). There were also graphic pictures and drawings of group sex, male and female masturbation (including photographs of dildos and vibrators), other acts of sodomy (buggery, bestiality) and sado-masochism, homosexual conduct (lesbians, males, pederasty)—as well as numerous other pictures and drawings of nude children and adolescents (even some of small children and adolescent males and females engaged in sexual intercourse).[5]

However, the plaintiffs *do not* object to this 1977 publication, and they *do not* claim that their mother/next friend "sold them into the sickness of child pronography" because their nude pictures appear in it. To the contrary, both the minor plaintiffs and their mother/next friend are very

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[5]A motion picture containing similar sexual activities by adults resulted in these comments by the Chief Justice of the Utah Supreme Court: "A more sickening, disgusting, depraved showing cannot be imagined. However, certain justices of the Supreme Court of the United States have said that before a matter can be held to be obscene, it must [one that] ' . . . when taken as a whole, lacks serious literary, artistic, political, or scientific value. Some state judges, acting the part of sychophants, echo that doctrine. *It would appear that such an argument ought to be advanced by depraved, mentally-deficient, mind-warped queers.* Judges who seek to find technical excuses to permit such pictures to be shown under the pretense of finding some intrinsic value to it are reminiscent of a dog that returns to his vomit in search of some morsel in the filth which may have some redeeming value to his own taste. *If those judges have not the good sense and decency to resign from their positions as judges, they should be removed either by impeachment or by the vote of the decent people of their constituency.'*" *Salt Lake City v. Piepenburg*, 571 P.2d 1299, 1303 (Utah 1977) (emphasis added).

proud of their nude pictures in this 1977 publication—*The Sex Atlas*—which they admire and which they consider to be a serious and comprehensive educational text on human sexuality published by The Seabury Press in conjunction with The National Sex Forum.[6] (L. Fredrickson Dep., vol. II at 36, 64).

Indeed, the mother/next friend, Linda Fredrickson, was employed at one time by The National Sex Forum. As a photographer, she even took some of the nude pictures which appear in *The Sex Atlas* (including those of two naked adolescents). And, before the nude pictures of the plaintiffs were taken, the mother/next friend executed a release giving the photographer, who was head of the audio-visual department at The National Sex Forum, "all rights" in the photos and the permission for him to use them in any manner he saw fit[7]—and the photographer, in turn, signed an agreement authorizing The National Sex Forum to use the nude pictures of the plaintiffs (and others) both in *The Sex Atlas* and "in connection with the sale and promotion of the book."

Sales of *The Sex Atlas* were, in fact, promoted in 1978—*with the approval of The National Sex Forum*—by a preview and book review which appeared in the November issue of *Hustler* and by a long excerpt ("Children,

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[6]In 1978, after *The Sex Atlas* was published, the name of The National Sex Forum was changed to "The Institute for Advanced Study of Human Sexuality."

[7]The plaintiffs *do not* claim that this release, and the parental consent by their mother/next friend for the publication of the nude pictures in *The Sex Atlas*, was invalid because there was no judicial approval of it.

Sex and Society") printed in the December *Hustler*. A nude picture of both the minor plaintiffs *and their mother/next friend* was in the November 1978 issue with the book review; nude photographs of the plaintiffs appeared in the December 1978 *Hustler*. The nude pictures of the plaintiffs in the two *Hustler* issues are identical to the nude pictures of them which appeared—with parental consent, and without any present objection—in *The Sex Atlas* in 1977.[8]

However, *Hustler* is a "hard-core" men's magazine, not a serious or educational study of sexuality like the *The Sex Atlas*. And it is offensive; it is controversial; and *it is just plain raunchy*.[9] Therefore, although the nude pictures of the plaintiffs in *Hustler* merely depict their bodies and genitals as young children,[10] there were nu-

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[8]And, as discussed below, in another publication—*Meditations on the Gift of Sexuality*—which was also published in conjunction with The National Sex Forum.

[9]*Hustler* has been described as "a coarse and sex-centered magazine." *Wood v. Hustler Magazine, Inc.*, 735 F.2d 1084 (5th Cir. 1984). Its companion magazine, *Chic*, has been described as "a glossy, oversized, hard-core men's magazine." *Braun v. Flynt*, 726 F.2d 245 (5th Cir. 1984). The writing style of *Hustler* is juvenile, its articles and fiction are at the level of a tabloid newspaper, and the photos of nudes in *Hustler* are much more explicit, sleazy and sadistic than those in *Playboy* or *Penthouse*. (See *Def. Exh. 16*).

[10]The plaintiffs, relying on *New York v. Ferber*, 102 S. Ct. 3348 (1982), insist that Hustler's use of their nude photographs constitutes "child pornography." Although one court has convicted Hustler's publisher, Larry Flynt, of distributing obscene materials—see *Flynt v. The State*, 153 Ga. App. 232, 264 S.E.2d 669, *cert. denied*, 101 S. Ct. 245 (1980)—the present case *does not* involve child pornography. In *Ferber*, the Supreme Court stated:

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merous other photographs and drawings in the two *Hustler* issues which were sexually explicit (but not often erotic) —bare breasts and nude bodies of women (sometimes attractive), female genitalia, male sex organs (only flacid, not erect), foreplay (explicit fondling of breasts, implicit fondling of genitals), and various acts of oral sex, sodomy and sado-masochism (implicit fellatio and cunnilingus, buggery, bestiality).[11] However, unlike *The Sex Atlas,*

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> "There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. . . . Here the nature of the harm to be combatted requires that the state offense be limited to works that *visually* depict sexual conduct by children below a specified age. . . .
>
> "We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection. . . ." (102 S.Ct. at 3358)."

Here, the nude pictures *do not* show the plaintiffs engaged in any sexual conduct or performing any sexual activity. Accordingly, neither the publication of the plaintiff's nude pictures in *Hustler* nor their publication in *The Sex Atlas* constitutes child pornography, as defined by *Ferber.* See footnotes 4 and 11.

[11]A book which described similar sexual activities resulted in these observations by Judge Curtis Bok of Pennsylvania, who was just as concerned about pornography as the Utah judge (see footnote 5) in *Piepenburg:* "It will be asked whether one would care to have one's young daughter read these books. . . . I should prefer that my own three daughters meet the facts of life and the literature of the world in my library than behind a neighbor's barn, for I can face the adversary there directly. If the young ladies are appalled by what they read, they can close the book at the bottom of page one; if they read further, they will learn what is in the world and its people, and no parents who have been discerning with their children need fear the outcome. . . . Our daughters must live in the world and decide

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the two issues of *Hustler* contain no photos or drawings of adolescents or children engaging in sexual intercourse —although they certainly contain much other material (profanity, violence, scatology, etc.) which is blatantly offensive.[12]

The plaintiffs and their mother/next friend are disgusted by this offensive and sexually explicit material in *Hustler;*[13] therefore, they object to the publication of the nude pictures of the plaintiffs in the November and December 1978 issues of *Hustler*. However, there is no objection to the plaintiffs' nude pictures themselves—since these are identical to the ones in *The Sex Atlas*—nor is there any objection to the written content of the book re-

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what sort of women they are to be, and we should be willing to prefer their deliberate and informed choice of decency rather than an innocence that continues to spring from ignorance. If that choice be made in the open sunlight, it is more apt than when made in shadow to fall on the side of honorable behavior." *Commonwealth v. Gordon,* 66 Pa. D. & C. 101 (1949), quoted in *United States v. Roth,* 237 F.2d 796, 813-14 at footnote 34 (2d Cir. 1956) (Frank, concurring), affirmed, 354 U.S. 476 (1957).

[12]Moreover, unlike *The Sex Atlas,* the two *Hustler* issues did not contain graphic pictures and drawings (i) of group sex (with the exception of a single photo in a movie review), (ii) of male and female masturbation (although there are advertisements for vibrators), or (iii) homosexual conduct by males (only lesbian sexual activity is depicted).

[13]Obviously, there are many persons who would be equally offended by the sexually explicit and graphic material in *The Sex Atlas*—which are catalogued above simply to show how its contents compare to the two *Hustler* issues—and who, unlike the plaintiffs and their mother/next friend, would not consider *The Sex Atlas* to be a serious medical or scientific publication in which nude pictures of children and adolescents could properly appear. See *Ferber,* 102 S. Ct. at 3365. Compare footnotes 5 and 11.

view in the November 1978 issue or *The Sex Atlas* excerpt in the December 1978 *Hustler*. And, despite their rather dramatic claims (quoted above), the minor plaintiffs do not really assert that their mother/next friend "sold them into the sickness of child pornography" because their nude pictures appear in *Hustler*.[14]

Instead, the plaintiffs object to Hustler itself. That magazine is tasteless; it is offensive; it is raunchy; it is filled with smut and sleaze and slime; and it is devoted primarily to sexual exploitation and disparagement of women. Therefore, the plaintiffs contend that, by publishing their nude photographs in the November and December 1978 issues, Hustler invaded their right to privacy by:

> (i) placing the plaintiffs in a false light by intimating that they approved of and participated in the acts and lifestyle depicted throughout *Hustler;*
>
> (ii) the public disclosure of embarrassing private facts about the plaintiffs; and
>
> (iii) misappropriating the plaintiffs' images for Hustler's commercial advantage.

To support these claims, the plaintiffs and their mother/next friend advance two novel positions. *First,*

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[14]At least the mother/next friend, Linda Fredrickson, has not been subjected to either state or federal criminal charges (i) under Texas Penal Code § 43.25(b), which prohibits parents from permitting their children to engage in a "sexual performance" for any photograph, play or motion picture, or (ii) under 18 U.S.C. § 2252, which prevents parents from allowing their children to engage in "sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct."

they claim that, prior to its publication of any photograph of a nude minor, a "skin magazine" has a duty to obtain judicial consent or to make certain that there is a court order permitting the use of nude pictures of the minor in the "skin magazine." Second, the plaintiffs contend that they may permit their nude photographs to appear in one public context, while prohibiting publication of them in another.

Both of these propositions are baseless. The release executed by the mother/next friend for the publication of the nude pictures of her minor children, the plaintiffs, was valid;[15] no judicial approval was required. The publication of the nude pictures of the plaintiffs in the book review and *The Sex Atlas* excerpt in *Hustler* was protected by this release and the photographer's agreement with The National Sex Forum. Moreover, the publication of these nude pictures did not improperly disclose private facts about the plaintiffs, put them in a "false light," or appropriate their images for *Husler's* commercial advantage.

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[15]For this reason alone, both of the two recent Fifth Circuit cases involving *Hustler* and its publisher, Larry Flynt, are distinguishable. In *Woods v. Hustler Magazine, Inc.*, 736 F.2d 1084 (5th Cir. 1984), the consent form was forged by the persons whole stole the nude picture of LaJuan Wood, and *Hustler* was negligent in veryifying the accuracy of that form before publishing the photo in the "Beaver Hunt" section of the magazine. In *Braun v. Flynt*, 726 F.2d 245 (5th Cir. 1984), an employee of *Chic*, a companion magazine to *Hustler*, fraudulently obtained consent to publish the picture from Mrs. Braun's employer, Aquarena Springs, by representing that *Chic* was a "fashion magazine" which had the "same clientele that would read a *Redbook* or *McCalls*."

For these reasons and the others discussed below—and because there are no genuine issues of any material facts—the motion for summary judgment of the defendant, Hustler Magazine, is GRANTED and the plaintiffs' motion for summary judgment is DENIED.[16]

2. *FACTUAL BACKGROUND*

a. *The Plaintiffs and Their Mother/Next Friend*

While they were attending the University of Florida in Gainesville, Linda Fredrickson married Gerald Faloona. She earned a Bachelor of Science in Nursing, specializing in pediatrics, diabetes, and research. He graduated with a Ph.D. in Biochemistry. (LF, vol. I at 7-12).[17]

While they were still living in Gainesville, their first child—Kelly Faloona—was born on June 16, 1966. Shortly thereafter, the family moved to Dallas, where Dr. Faloona accepted a teaching position at Bishop College, and Linda Fredrickson Faloona continued her nursing career. On March 27, 1968, their second child—Brandon Faloona—was born in Dallas. (LF, vol. I at 7-9).

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[16]The summary judgment record consists of all pleadings, depositions, and answers to interrogatories and requests for admissions. Rule 56(c), Fed.R.Civ.P. It also consists of all trial exhibits filed pursuant to the Pretrial Order; the parties stipulated the authenticity of these exhibits, and this Court will consider them to the extent they would be admissible at trial. (All of the exhibits mentioned in this opinion except two—Court's Exh. 1 and Pl. Exh. 12—are also exhibits to the depositions.) However, some of the exhibits—such as the *Affidavit of Neil Adelman* attached to the Defendant's Supplemental Memorandum (August 18, 1983)—*are clearly hearsay and are inadmissible;* accordingly, they have not been considered in any way by this Court.

[17]The depositions of Linda Fredrickson, Kelly Faloona, and Brandon Faloona will be cited as "LF," "KF," and "BF." Exhibits will be cited as "Pl. Exh. —" or "Def. Exh. —."

Sometime during 1971, the Faloonas separated. The children and their mother moved to San Francisco; the father remained in Dallas, where he has lived ever since. (LF, vol. I at 68). A California court granted the Faloonas a final divorce on December 27, 1971, awarding the mother, Linda Fredrickson, the "care, custody, and control" of both Kelly and Brandon, subject to the father's reasonable visitation rights. (Def. Exh. 1). At this time, Linda Fredrickson resumed her maiden name. (LF, vol. I at 3). Kelly was then five, and Brandon was three.

b. *San Francisco: 1971-1977*

When she and the children arrived in San Francisco in 1971,[18] Linda Fredrickson accepted a position as

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[18]The minor plaintiffs and their mother/next friend moved frequently during the period they lived in San Francisco. Upon arriving in 1971, they moved into a house with Norman Riffe, Robert Krause, and Susan Kreager. (LF, vol. I at 15-17). Linda Fredrickson refused (on advice of counsel) to answer whether or not she was "romantically involved" with Riffe, a journalist-film producer-roller rink operator, who had also moved to San Francisco from Dallas in 1971. (*Id.* at 15-21). She described their living arrangements in the house as "not a commune," but "cooperative living." (*Id.* at 28-29).

Approximately one year later, Norman Riffe moved to a farm in the country and Linda Fredrickson rented a two-bedroom apartment for her and the two children. (*Id.* at 27). In 1973 and 1974, the plaintiffs, their mother, Norman Riffe and Hilton Braithwaite lived together in a rented house. (*Id.* at 28-30). One year later, the plaintiffs and their mother/next friend moved again, this time to a house with Tina Lunde, Joe Van Whitson and Nessa Munter. (*Id.* at 30-3). Apparently, Norman Riffe returned to Dallas at that time. (*Id.* at 21).

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a Registered Nurse at St. Mary's Hospital, a psychiatric care facility. In September of 1972, she attended a ten-day course in "sexual attitude restructure" at the National Sex Forum. Although she originally attended this course to advance her nursing career, Linda Fredrickson became so interested in the work of the National Sex Forum that—in January of 1973—she resigned from St. Mary's to accept a full-time position as an Educational Director at the Sex Forum. (LF, vol. I at 35).

As part of her new job, Linda Fredrickson conducted tours, arranged group programs for college students, and lectured on "Human Sexuality Through the Ages." She also helped to produce several educational films for the Institute.[19] During her courses and work at The National Sex Forum, Linda Fredrickson met and worked with (i) *Dr. Laird Sutton*, a photographer and head of the audio-visual department; (ii) *Dr. Ted McIlvenna*, a psychologist

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Under an oral agreement between their parents, the plaintiffs lived with their father in Dallas during the entire 1975 and 1977 school years (and during summer vacations in the other years). (*Id.* at 109-10, 113). In 1976, the plaintiffs and their mother/next friend lived in another two-bedroom apartment in San Francisco. In 1977, the plaintiffs returned to Dallas to live with their father. Linda Fredrickson moved back to Dallas in December of 1977 (*id.* at 113) and, apparently for some period, shared a house with the plaintiffs' father, Rose Sullivan, Vivian Dent, and Glen and Mary Crow. (*Id.* at 114-15).

[19]One film concerned how paraplegics deal with their sexuality. (LF, vol. I at 59-60, 62). Another was an educational film depicting nude adults engaged in various sexual acts. Other films which Linda Fredrickson showed in the classes, or viewed while working at The National Sex Forum, depicted heterosexual intercourse, oral sex, and homosexual intercourse, but only in a "loving, caring" manner. (*Id.* at 43-44).

and Executive Director of The Sex Forum; and (iii) *Dr. Erwin J. Haeberle,* a sexologist who was then researching and writing *The Sex Atlas.* (LF, vol. I at 35-38).

After working for The Sex Forum for 1½ years, Linda Fredrickson left to pursue her film-making interests on a full-time basis at the San Francisco Art Institute. She received a scholarship, but to support herself and the children, she also returned to her position as a Registered Nurse at St. Mary's Hospital. In May of 1977, Linda Fredrickson received a Masters in Fine Arts (Film Making); and, in December of that year, she returned to Dallas. (LF, vol. I at 41, 59, 69, 70, 76, 108-110).

c. *Nude Photographs of the Plaintiffs*

In 1972, Dr. Erwin Haeberle, a sexologist associated with The National Sex Forum, began work on *The Sex Atlas,* which was intended to be a comprehensive educational text on human sexuality. In September of 1972, Dr. Laird Sutton, the photographer—who had met Linda Fredrickson when she attended the ten-day sexual attitude restructure course taught by Dr. Ted McIlvenna—asked if she and her children would pose for nude photographs to be used in *The Sex Atlas.* Linda Fredrickson discussed this with the children, and with their father, Gerald Faloona, and then agreed. (LF, vol. I at 82; BF at 23). Sutton took the first set of photographs at the studio in his home in the fall of 1972. The plaintiffs were then six and four. Linda Fredrickson received $100 for that set of photographs, but the National Sex Forum never used them. (LF, vol. I at 78-84).

About a year later in 1973, Sutton again photographed the plaintiffs and their mother.[20] Kelly was then seven and Brandon was five. Although the National Sex Forum did not pay any money for this second set, Linda Fredrickson was given several copies of the nude photographs. (LF, vol. I at 86, 93-94). She gave the children's father one photograph—a nude frontal view of the mother holding both children in her arms—and he hung it above the desk in his bedroom (*Id.* at 87-88, 106-07). Linda Fredrickson displayed one of the nude pictures of her and the plaintiffs on their kitchen wall. (*Id.* at 97-98, 108; BF at 30-31). Both photographs were in full view of anyone visiting in the respective homes. (*Id.* at 107-09).

On August 2, 1973,[21] Linda Fredrickson executed two "Photographic Release Forms" for Dr. Laird Sutton. (Def. Exhs. 2, 3). One form was for her, the other was for the two minor children. The Forms are identical and they provide:

> "That . . . the undersigned was employed to participate and/or act in a photographic representation photographed by Laird Sutton and for which the undersigned has received just compensation.
>
> "That one of the terms of employment was that *the employer* [*Sutton*] *was free to use the photographs in any manner employer deemed fit*, whether by sale to the general public, sale to a limited audience, or no sale at all.

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[20]On both occasions, Sutton shot four rolls of black and white film. Both sets included nude frontal poses of the two children separately, together, and with their mother/next friend, Linda Fredrickson.

[21]The release signed by Linda Fredrickson for herself bears the date August 2, 1972, while the one she signed for the plaintiffs is dated August 2, 1973. However, she testified that 1973 was the corect date for both releases. (LF, vol. I at 131-33).

"That *the employer [Sutton] has made no representation to the undersigned as to distribution of the photographic representation*, or any use employer may make of said representation.

"That *the undersigned retains no rights whatsoever* to the photographic representation or to the literary or artistic product in which the photographic representation is an integral part, and hereby, for a valuable consideration, releases and indemnifies the employer from and against any and all claims the undersigned may make in the future against employer or employers assigns resulting from said employment." (emphasis added).

Linda Fredrickson read the release forms before signing them, and she understood the provisions. Although she believed the photographs were only to be used in *The Sex Atlas*, she knows the forms did not state this before she signed them.[22] Moreover, she does not contend that Dr. Laird Sutton defrauded her in any way or tricked her into signing the releases. (LF, vol. I at 131-34.).

d. *The Sex Atlas*

In November of 1972, Dr. Laird Sutton entered into a written Agreement with Dr. Erwin Haeberle and The National Sex Forum which provided that, in return for payment of $5,000 "as a flat and final fee," Sutton (i) granted The National Sex Forum the exclusive right to use 100 photographs in *The Sex Atlas*,[23] (ii) represented that these photographs did not violate the right of privacy of anyone

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[22]Accordingly, any claim by the plaintiffs or their mother/next friend that there was some oral representation by Sutton, *before the release was signed*, that publication of the nude pictures would be limited to *The Sex Atlas* is precluded by the parol evidence rule. (LF, vol. III at 13).

[23]At that time, the tentative title of Dr. Haeberle's book was "The Love and Sex Book." (Def. Exh. 10).

and that he was their sole owner, and (iii) provided that Dr. Haeberle and the Forum were entitled to use the photographs only in *The Sex Atlas* and *"in conjunction with the sale and promotion of the book."* (Def. Exh. 10) (emphasis added).

In 1976, while employed by The National Sex Forum, Linda Fredrickson began taking photographs for use in *The Sex Atlas*, including frontal shots of nude adults and children. (LF, vol. I at 126-31). On March 1, 1976, in return for a $450 payment for nine nude pictures, she executed an Agreement with Dr. Haeberle and the Forum which was identical to the one executed by Sutton. (Def. Exh. 11). In May of 1976, Linda Fredrickson drafted a release form covering nude photographs that she had taken of a minor; that form specifically limited use of the photographs to *The Sex Atlas*. (Def. Exh. 4; *Id.* at 130-31). The minor's father signed the release on his son's behalf.[24]

In 1977, *The Sex Atlas* (Pl. Exh. 3) was published by The Seabury Press, which had purchased the rights from Dr. Haeberle and The National Sex Forum. (Def. Exhs. 20, 21). The plaintiffs were then eleven and nine. Nude photographs of them, taken when they were seven and five, appear at pages 12, 13, 142, 154 and 155. Nude pictures taken by Linda Fredrickson appear on pages 14 and 15 (adolescent male and female), 17, 18, 19, 150 and 162 (genitals of adolescent male and female). (See *The Sex Atlas*, Pl. Exh. 3).

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[24]Contrary to her position as "next friend" in this case, Linda Fredrickson did not seek any court approval of this release—but acted as if the father had the legal authority to sign a valid release on behalf of his son.

The plaintiffs and their mother/next friend admired *The Sex Atlas;* they were proud of it and the nude pictures. They went to a nearby bookstore in Dallas to see it. (BF at 17-18). Although they did not purchase a copy at that time, they later acquired *The Sex Atlas* and displayed it prominently in their living room. In fact, Kelly and Brandon routinely showed their nude pictures in *The Sex Atlas* to friends visiting in their home. (LF, vol. II at 46; KF at 16-17, 20).

e. *Meditations on the Gift of Sexuality*

In 1977, a book prepared by Dr. Ted McIlvenna (text) and Dr. Laird Sutton (photographs)—*Meditations on the Gift of Sexuality*[25]—was published by Specific Press in conjunction with The National Sex Forum.[26] On page 61, this book contained a nude photograph of both the plaintiffs and their mother/next friend. Before this picture was used, Dr. Sutton had called Linda Fredrickson, supposedly to obtain a "telephone release" from her for this particular photograph, which had not been used in *The Sex Atlas.* (LF, vol. III at 15-18). Later, Linda Fredrickson learned that she had been mistaken about which picture was to be used in *Meditations*—during the call from Sutton she

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[25]*Meditations* describes the interplay of religion and human sexuality. The text includes numerous biblical quotations and is illustrated by photographs of nude adults engaged in various sexual acts, including masturbation, heterosexual intercourse, homosexual intercourse, group sex, and oral sex. (See LF, vol. III at 16-17, 29.) *Both McIlvenna and Sutton, in addition to their Ph.D's, were Methodist ministers.* (LF, vol. I at 35-36, 48-49; LF, vol. III at 18). At the Court's request, the parties supplied a copy of *Meditations;* it appears in the record as Court's Exh. 1.

[26]Specific Press was located in the offices of The National Sex Forum. (LF, vol. III at 32).

thought it was the same nude picture of her and the children which was displayed above the father's desk—and she called Dr. McIlvenna to discuss this. (*Id.* at 15-17).

Dr. McIlvenna was not available, so Linda Fredrickson merely told his secretary that the National Sex Forum should not use any of their photographs again without first contacting her. She also told the secretary that she was moving to Dallas and could be reached there. However, Linda Fredrickson did not confirm her protest in writing—or file a lawsuit against either Sutton, McIlvenna, the Forum, or Specific Press. (LF, vol. I at 102-03; LF, vol. III, at 14-20, 31-34). Indeed, although Linda Fredrickson has not read *Meditations*, and although she has some concern about its emphasis on group sex, she has no real objections to the book—and still believes, as she did in San Francisco, that Dr. McIlvenna's premise for *Meditations* is correct: that "in order for people to be in touch with God, they have to be in touch with their own sexuality." (LF, vol. I at 48-49; LF, vol. III at 15-17, 28, 34).

f. *The Nude Pictures in Hustler*

In June of 1978, Hustler became interested in publishing an excerpt from *The Sex Atlas*. Hustler contacted Dr. Haeberle, the author, and learned that The National Sex Forum—now "The Institute for Advanced Study of Human Sexuality"—had assigned all rights to Seabury Press. (Def. Exh. 5). In July, Michael Scott of Hustler submitted to Seabury Press and to Dr. Haeberle a "5000 word excerpt," together with copies of the photographs he wanted to use. (Def. Exh. 7). On July 27, 1978, Ulla Schnell of Seabury Press confirmed by letter that, in exchange for a payment of $600, Hustler had permission to publish the excerpt and the photographs. (Def. Exh. 10; Schnell Dep. at

22, 30-33). By the same letter, Schnell advised Hustler that it should give proper credit to the photographers—Laird Sutton, Coni Beeson, and *Linda Fredrickson.*

In the November 1978 issue (Pl. Exh. 1), the "Preview Page" (p. 126) announced the coming *Sex Atlas* excerpt, "complete with an unusual photo spread," illustrating this Preview with a nude photograph of other children from *The Sex Atlas.* This issue also contained a two-page review of *Meditations on the Gift of Sexuality* (Pl. Exh. 1, pp. 32-33); this review uses six photographs from *Meditations* —five depict scenes of group sex, and the remaining one is the nude picture of the plaintiffs and their mother/next friend taken by Dr. Sutton. (Ct. Exh. 1, p. 61). The photograph was not altered in any way; ***neither it nor the review identifies the plaintiffs by name.*** The two pages of the review face each other, and they contain nothing besides the pictures from *Meditations* and the written comments about that book.

The plaintiffs first became aware that Hustler had reprinted this photograph when they went to a barbeque at the home of Norman Riffe in Dallas. When Brandon and his mother arrived, Kenny Riffe (age 24) met them at the door, waving a copy of *Hustler* and saying: "You're a star. You're a star. You're in *Hustler* magazine." (LF, vol. I at 119-20; vol. II at 12; BF at 18). Kenny Riffe later made the same comment to Kelly and her father when they arrived. Immediately after that, the parents took the plaintiffs into a private room. After some discussion, Linda Fredrickson said: "What are we going to do?" "This isn't right." (LF, vol. II at 22; KF at 24; BF at 23-24)—and they decided to "get hold of some lawyers."

Linda Fredrickson called an attorney that night. Later, he helped her draft a telegram, which was sent to Hustler on October 25, 1978; it demanded that Hustler not publish any of the nude pictures of the plaintiffs from *The Sex Atlas* in the excerpt to be run in the December 1978 issue (Pl. Exh. 7; LF, vol. II at 22)—and stated that Kelly and Brandon Faloona "have never lawfully given to any person or entity permission to publish the photographs which appear on pages 12, 13, 142 and 154 of *The Sex Atlas* or to publish any similar photographs."[27]

The December 1978 issue of *Hustler* (Pl. Exh. 2) was mailed beginning October 27, 1978—two days after the plaintiffs' telegram—and general distribution of that issue began on November 2, 1978.[28] The "5000 word excerpt" from *The Sex Atlas* (Pl. Exh. 3) is entitled "Children, Sex and Society." It is illustrated with ten pictures from *The Sex Atlas;* one of these is a nude picture of the plaintiffs (*Sex Atlas,* p. 142), one is the photograph made by Linda Fredrickson of the nude genitals of an adolescent male and female (*Sex Atlas,* p. 162), and the remaining pictures are of other children or adolescents. The excerpt begins on page 71 of the December 1978 *Hustler;*[29] the plaintiffs'

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[27]The plaintiffs and their mother/next friend never contacted Seabury Press to complain about the fact that Seabury gave Hustler permission to use the photographs—nor do they bear any ill feelings toward Dr. Laird Sutton for using their photograph to illustrate *Meditations.* (LF, vol. III at 10-11). Linda Fredrickson did call Dr. Haeberle to complain about the nude picture in the November 1978 *Hustler,* but his attitude seemed to be "so what?" (LF, vol. II at 8).

[28]*Hustler* claims that it did not receive the telegram in time to stop distribution of the December 1978 issue. However, the plaintiffs claim that *Hustler* still has 2,047 copies of this issue available for sale.

[29]On the facing page (70), there is a non-sexual and non-funny cartoon and the continuation of a supposedly humorous article about necrophelia. (Pl. Exh. 2, at 70-71).

nude picture is on page 73—and neither it nor the facing page (72) contain anything but the excerpt and other pictures from *The Sex Atlas.*[30] (Pl. Exh. 2, at 72-73). The photograph was not altered in any way, nor are the plaintiffs identified by name, either by the photograph or the written excerpt.

g. *The Alleged Damages*

By this suit, the plaintiff Kelly Faloona seeks $2.5 million in actual damages and $7.5 million in punitive damages; the plaintiff Brandon Faloona also seeks a total of $10 million in actual and punitive damages.[31]

Both plaintiffs claim that the appearance of their nude pictures in *Hustler* "shocked" and "scared" them—and that they were afraid that their friends would see these nude pictures or find out about them, or that someone might confront them with a copy of *these* issues of *Hustler.*[32] (BF

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[30]The *Sex Atlas* excerpt concludes on pages 86 and 122-124 of the December 1978 issue; no other photographs from *The Sex Atlas* are used, although these pages either include or face other *Hustler* cartoons and advertisements. (Pl. Exh. 2).

[31]Their mother/next friend, Linda Fredrickson, does not seek any damages for the publication of her nude picture in the November 1978 *Hustler.* And, she has no right to recover damages because of the publication of the plaintiffs' nude pictures in *Hustler* because "Texas does not recognize a relational right to privacy or to recover damages for defamation." *Braun,* 726 F.2d at 248, footnote 4.

[32]The plaintiffs knew what these issues of *Hustler* contained because they were permitted to examine both issues "since their nude pictures were in them." (LF, vol. II at 66-67). They also were permitted to attend all of the depositions in this case and examine all of the exhibits, including the other *Hustler* magazines. (*Id.* at 101).

at 20, 24, 31-32; KF at 30-34). In particular, Brandon became concerned after a friend who collected "skin magazines" showed him a centerfold from *Hustler,* and Kelly thought that *Hustler* might use her photograph on the cover. (BF at 26-28; KF at 34). The plaintiffs also assert that the publication of their nude photographs in *Hustler* caused them to lose sleep and that their grades have suffered. (LF, vol. II at 27; BF at 24, 34, 42; KF at 29-32). And, Kelly claims that it has damaged her chances of becoming President of the United States because "when you run for anything public, they scrounge around for the worst they can get on you. . . ." (KF at 26; LF, vol. II at 204).[33]

In response, Hustler claims that despite their claims of mental anguish, the plaintiffs never sought psychiatric or medical treatment (BF at 32-33; KF at 28-31), that they completed their school terms with passing grades (BF at 32, 44-45; but *cf.* LF, vol. II at 27, 40); that they both continued to participate in extracurricular activities (BF at 32-33, 35-41; LF, vol. II at 52-54), and in all respects appear to have led unchanged lives. In addition, Hustler claims that the only person who ever identified the plaintiffs from the nude pictures was a close friend who had not only purchased a *Hustler* magazine, but who had also seen the photographs of the plaintiffs in *The Sex Atlas.* (LF, vol. I at 119-20; KF at 21; but see LF, vol. II at 137, 198-99 where the mother/next friend describes her disgust with "the type of person" who reads *Hustler*). Finally, Hustler claims that, if the plaintiffs have suffered any psychological damage, it

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[33]Kelly maintains that, while her future presidential hopes could not survive exposure of the fact that her photograph appeared in *Hustler,* it could survive disclosure of the facts that her nude pictures appeared in *The Sex Atlas* and in *Meditations.* (KF at 26).

is due to other causes (see footnotes 18 and 32)—including the decision of their mother/next friend to expose the private lives of her and the children through this lawsuit.[34]

Hustler printed 1.9 million copies of the December 1978 issue; of these, some 1.4 million have been sold (and *Hustler* still has 2,047 copies in its possession for sale). In contrast, through 1980, Seabury Press had distributed 67,250 hardcover and 9,900 paperback copies of *The Sex Atlas*—and a new, expanded version was published in May of 1983. (Def. Exh. 30, 31). However, the mother/next friend testified:

> "It's okay for 70,000 people to look at the pictures of the children in *The Sex Atlas*. It's not okay for one person to look at one picture of my children in *Hustler*." (LF, vol. 1 at 184)."

3. *CHOICE OF LAW*

Texas has adopted the approach of the Restatement (Second) of Conflict of Laws in a deciding choice of law questions. *Duncan v. Cessna Aircraft Co.*, 655 S.W.2d 414 (Tex. 1983) (contracts); *Guitierez v. Collins*, 583 S.W.2d 312 (Tex. 1979) (Torts). That approach analyzes each separate issue, and applies the state law having the most significant relationship to each issue. This diversity case involves two issues: (i) the right of privacy; and (ii) the validity of the release signed by the mother/next friend on behalf of the minor plaintiffs. Both California and Texas have some interest as to each issue. However, for the fol-

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[34]Contrary to the arguments of the plaintiffs and the mother/next friend, the attorneys for Hustler would be entitled to cross-examine them about these matters at trial because they are, without question, relevant to the issue of damages.

lowing reasons, Texas law—the law of the forum state—should apply to both issues.

a. *The Right of Privacy*

With respect to a tort issue, under § 145 of the Restatement the contacts between the parties and the interested states are to be evaluated according to their relative importance to the issue. And, § 153 of the Restatement, which deals specifically with the right of privacy, gives particular weight to the state of the plaintiffs' domicile at the time the injury occurred "if the matter complained of was published in that state."

When Hustler published and distributed the November and December 1978 issues, the plaintiffs and both of their parents were domiciled in Texas. Moreover, as discussed above, the plaintiffs have at all times retained close ties to Texas. Therefore, even though the conduct causing the alleged injuries arguably took place in at least three other states—California, where the photographs were taken and where Hustler does business; Ohio, where Hustler is incorporated and has offices; and New York, where Seabury Press granted Hustler permission to use the photographs—the principal injuries, if any, occurred in Texas, where the plaintiffs lived when the two issues of *Hustler* were distributed.

Accordingly, Texas law will be applied to the right of privacy claims. *See Wood v Hustler Magazine, Inc.*, 736 F.2d 1084 (5th Cir. 1984) ("The district court [correctly] determined that the law of Texas, not California, applied" to claims by a Texas resident concerning the invasion of her privacy by Hustler).

b. *Validity of the Release.*

A parent's power to sign a binding "Photographic Release Form" on behalf of minor children involves aspects of both contract and family law. Therefore, although the place of contracting, the location of the subject matter of the contract, and the reasonable expectations of the parties are to be considered, substantial weight must be given to the domocile of the plaintiffs and their parents. *See* Restatement (Second) of Conflict of Laws, § 188.

In this case, both the plaintiffs and their parents have strong contacts with Texas. Kelly began living in Dallas when she was one year old; Brandon was born here. Although the plaintiffs and their mother/next friend did live in California for a relatively short period, the father remained in Dallas and has lived here continuously since 1967. Moreover, the plaintiffs not only spent summer vacations in Dallas during this period, they actually lived here with their father during the 1975 and 1977 school terms. Indeed, they moved back to Dallas in 1977 before their mother did. These close ties with Texas give this state a very strong interest in governing the relationship between the plaintiffs and their parents. In addition, California no longer has jurisdiction over custody matters since the plaintiffs and both parents now reside in Texas.

Of course, the release was executed in California, all parties to the release lived in California at that time, and the mother/next friend had "care, custody, and control" of the plaintiffs pursuant to a final divorce issued by a California court. However, before the mother consented to the nude pictures, she first obtained approval from the father in Texas. Moreover, the release does not restrict use of the

photographs to California. Indeed, Dr. Sutton obtained the right to use the photographs in any manner, and they were used in *The Sex Atlas,* which was distributed nationwide. Accordingly, California's interests concerning the validity of the release is not as strong as that of Texas—so Texas law will also govern the release issue.[35]

4. *VALIDITY OF THE RELEASE*

On August 2, 1973, the mother/next friend executed a "Photographic Release Form" covering the nude photographs made of the minor plaintiffs. That release granted all rights in the pictures to Dr. Laird Sutton, the photographer who took them. It also provided that Dr. Sutton was free to use the nude pictures in any way he saw fit—and that he had made "no representations" as to the distribution or use of these pictures. (Def. Exhs. 2, 3). Sutton granted Dr. Erwin Haeberle and The National Sex Forum the right to use the nude pictures of the plaintiffs in *The Sex Atlas* and "in conjunction with the sale and promotion of the book."[36] Dr. Haeberle and The National Sex Forum entered into similar agreements with Seabury Press, which then published—and promoted the sale of—*The Sex Atlas.* (Def. Exhs. 20, 21).

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[35]As discussed below, although neither state has addressed the precise issue presented in this case, the release executed by the mother/next friend on behalf of the plaintiffs is binding regardless of whether Texas or California law is applied.

[36]The book review of *Meditations* in the November 1978 *Hustler* and the excerpt and pictures in the December 1978 *Hustler* were designed to promote the distribution and sale of *The Sex Atlas,* in accordance with the agreement between Sutton, Haeberle and The National Sex Forum. (Def. Exhs. 10, 20, 21).

Hustler asserts that the release executed by the mother/next friend, Linda Fredrickson, is a complete defense to the plaintiffs' claims that their right of privacy was violated by the publication of the nude pictures of them.[37] In defense, the plaintiffs *and* the mother/next friend claim that this release is not valid—because this Court, in a landmark decision, should hold that a "skin" magazine[38] may not publish nude pictures of a minor before it either (i) obtains court approval of a release signed by parents on behalf of the minor, or (ii) makes certain that the parents have obtained a valid judicial order permitting the use of nude pictures of the minor.[39]

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[37]See *Wood v. Hustler Magazine, Inc.*, 736 F.2d at 1089, footnote 1; Restatement (Second) of Torts, § 652F comment b (1976). In the present case, unlike *Wood* and *Braun v. Flynt*, 726 F.2d 245, there is no claim of fraud or wrongdoing in connection with the consent form. Specifically, the mother/next friend, Linda Fredrickson, concedes that Dr. Laird Sutton, a Methodist minister, did not defraud her in any way or trick her into signing the release. See footnote 22.

[38]The plaintiffs and their mother/next friend do not even attempt to define the term "skin magazine"—although they seem to assume that, whatever a "skin magazine" may be, *Hustler* certainly fits the definition. Evidently, they expect that future courts, when deciding whether a particular book or magazine should have obtained court approval prior to publishing the nude picture of a minor, will simply "know a skin magazine when they see one." See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Justice Stewart, concurring).

[39]Nor do the plaintiffs and their mother/next friend explain how the court approval for publication of nude pictures of minors is to be obtained—whether by an original lawsuit or by some type of ancillary proceeding in the domestic relations court (where the parents are divorced), or in the juvenile or some other court—in the absence of a specific statute creating such a procedure.

a. *Texas Law*

This novel contention is baseless. Under Texas law, Hustler was not required to seek court approval for the publication of the nude pictures of the plaintiffs or to ensure that someone else had obtained judicial approval.

Although there are no Texas cases directly on point, § 12.04(7) of the Texas Family Code specifically gives a parent the power to consent to matters of "substantial legal significance concerning the child"—and § 12.04(2) gives the parent the duty of "care, control, protection, moral and religious training, and reasonable discipline of the child." The power to consent to publication of a photograph of a child (whether nude or not) is a matter of "substantial legal significance," as well as a matter concerning the care, protection and training of the child. Therefore, § 12.04(7) and § 12.04(2) are dispositive of this issue.

Moreover, there is no provision in *any* Texas statute which requires court approval of parental consent under these, or any other, circumstances.[40] Indeed, in § 43.25 of the Texas Penal Code, the legislature addressed a similar issue; there, it provided that parents may not consent to the participation by their children in a "sexual performance" involving actual or simulated sexual inter-

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[40]Actually § 43.24(c)(1) of the Texas Penal Code Ann. (Vernon 1974) recognizes a parent's power to consent for a minor under similar circumstances. Under that section, if a minor is accompanied by a consenting parent, a store owner has an absolute defense to a charge of selling obscene material to that minor.

course, masturbation, lewd exhibition of the genitals, etc.[41] Had the legislature intended, it could easily have prohibited parents from consenting to the publication of all nude pictures of their children—even those that are not "child pornography" under *New York v. Ferber*, 102 S.Ct. 3348 (1982)—*without court approval.* Of course, it did not.

This Court will certainly not take it upon itself to usurp the role of the Texas Legislature—*not to mention the responsibilities of parents in raising their children*—by creating such an unwise[42] and unmanageable[43] requirement as that urged by the plaintiffs and their mother/next friend. Accordingly, the release is valid, and it is a complete defense to the plaintiffs' right of privacy claims. *Wood v. Hustler Magazine, Inc.*, 736 F.2d at 1089,

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[41]The federal statute prohibiting "sexual exploitation of children" is 18 U.S.C. § 2252. It also prohibits parents from consenting to "sexually explicit conduct" by their children in photographs, movies, or plays.

[42]As discussed above, there are many who would—unlike the plaintiffs and their mother/next friend—take great offense to *The Sex Atlas* and to *Meditations*. They would consider these to be trash, nothing but "skin books." See footnotes 5, 11 and 13. And, they could use the same novel argument of required judicial approval to attempt to stop the publication of serious medical or scientific or artistic works which—with the consent of the parents—contain nude pictures of children and adolescents. See *Ferber*, 102 S. Ct. at 3365.

[43]If parental consent to the publication of photographs is not valid under § 12.04(2) and (7)—and can be disaffirmed, as the plaintiffs claim—then the court can "eagerly" await litigation by minors seeking damages, despite parental consent, for such things as injuries sustained on school trips or in extracurricular activities, alleged damages from publication of photographs in newspapers or on television, etc.

footnote 1; Restatement (Second) of Torts, § 652F comment b (1976).[44]

b. *California Law*

The release executed by the mother/next friend is equally valid under California law. Section 3344 of the California Civil Code, which codifies the common law cause of action for misappropriation of name or likeness, provides:

> "Any person who knowingly uses another's name, photograph, or likeness . . . without such person's prior consent, *or in the case of a minor, the consent of his parent or legal guardian*, shall be liable for any damages sustained by the person or persons injured as a result thereof . . ."

This section obviously recognizes the validity of parental consent, and it contains no exception for pictures of minors which appear in "skin magazines."[45] Although

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[44]In the alternative, the plaintiffs and their mother/next friend assert that the release is void as an illegal contract because it permitted the publication of "child pornography"—i.e., the nude pictures of the plaintiffs—in *Hustler*. This is also baseless. The nude pictures of the plaintiffs are not "child pornography" because they do not show the plaintiffs engaged in any sexual acts. *New York v. Ferber*, 102 S. Ct. 3348; *Hunt v. State*, 475 S.W.2d 935 (Tex. Crim. App. 1972). The nude photographs of the plaintiffs—admired, and admittedly not obscene, when published in *The Sex Atlas*—did not become "child pornography" when they appeared in *Hustler*.

[45]California does have a statute which requires court approval of employment contracts for child actors and models. *See* Cal.Civ.Code § 36. However, that provision was enacted for the protection of the employer to prevent a minor from disaffirming a contract. Accordingly, it is inapplicable here. *See Morgan v. Morgan*, 34 Cal. Rept. 82 (Cal.App. 1963).

the statute may apply only to "commercial appropriation" claims, it would be ludicrous for California common law —which § 3344 partially codifies—to provide that parental consent is a defense to one type of "right of privacy" claim and not the others. Therefore, in the absence of any California cases directly in point, it is logical to assume that parental consent also bars a common law claim for invasion of privacy by "publication of private facts" or by "placing the plaintiffs in a false light."[46]

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[46]New York law also specifically provides that parental consent is a defense to a minor's claim of invasion of privacy. New York Civil Rights Law, §§ 50-51. In a case virtually identical to this one—*Shields v. Gross,* 58 N.Y.2d 338, 461 N.Y.S.2d 254 (1983)—the Court of Appeals of New York considered the narrow issue of the validity of a photographic release for nude photographs of the minor signed by the parent on the minor's behalf. Noting that the plaintiff, *Brooke Shields,* had allowed her nude photographs to be widely distributed—including publications by *Playboy* and *Penthouse*—the court held that the mother's release was valid, stating:

> " . . . Nor do we think court approval necessary under the circumstances existing in the normal child model's career. Given the nature of the employment, *it is entirely reasonable for the Legislature to substitute the parents' judgment and approval of what is best for their child for that of a court.*
>
> . . .
>
> "Finally, it is claimed that the application of the statute as we interpret it may result in unanticipated and untoward consequences. If that be so, there is an obvious remedy. *A parent who wishes to limit the publicity and exposure of her child need only limit the use authorized in the consent,* for a defendant's immunity from a claim for invasion of privacy is no broader than the consent executed to him . . ." (461 N.Y.S.2d at 258).

In the present case, the mother/next friend, Linda Fredrickson, did not limit the use of the plaintiffs' nude pictures in the release given to Dr. Laird Sutton; in contrast, she did specifically limit the use of the nude photographs that she took of a minor. See footnote 24; Def. Exh. 4; LF, vol. I at 130-31).

5. *THE RIGHT OF PRIVACY CLAIMS*

In addition to the fact that the release affords a complete defense to Hustler, the right of privacy claims made by the plaintiffs and their mother/next friend are baseless.

a. *The "False Light" Contentions*

The plaintiffs claim that the publication of their nude pictures in the two issues of *Hustler* placed them in a false light by intimating that they approved of and participated in the acts and lifestyle depicted throughout *Hustler*. Under Texas law:

> "One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."

Restatement (Second) of Torts § 652(e) (1977); *Braun v. Flynt*, 726 F.2d 245, 252 (5th Cir. 1984).

However, under Texas law, "the court must make a threshold determination of whether the complained of publication is capable of conveying defamatory or false meaning." *Braun*, 726 F.2d at 253; *Golden Bear Distribution Sys. v. Chase Revel, Inc.*, 708 F.2d 944 (5th Cir. 1983). Contrary to the plaintiffs' arguments, *Braun* does

not hold that—merely because they object to the "obscene, nude, profane, lurid and pornographic" contents of *Hustler* —the publication of their nude pictures in *Hustler* automatically placed the plaintiffs in a false light. Indeed, *Braun* is not only distinguishable from this case,[47] it illustrates why the "complained-of publication" of the plaintiffs' nude pictures in *Hustler* is not capable of conveying "derogatory or false meaning."

(i) *the proper context*

Braun, of course, states that the entire *Chic* magazine should be introduced into evidence "so that the jury could, in effect, be placed in the position of the ordinary reader." (726 F.2d at 253-54). The *Braun* panel rejected the rather absurd contention that "we should cut out Mrs. Braun's picture and look solely at it" to determine whether she had been placed in a false light—because "common sense dictates that the context and manner in which . . . a picture appears determines to a large extent the effect which it will have" on an ordinary reader. (726 F.2d at 254).

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[47]In addition to the differences discussed below, *Chic*—the companion magazine to *Hustler*—fraudulently obtained the "consent" for the publication of the picture of Mrs. Braun and her novelty act with "Ralph the Diving Pig." *Braun v. Flynt*, 726 F.2d at 247-48. However, in this case, the mother/next friend, Linda Fredrickson, does not contend that Dr. Laird Sutton—the photographer, a Methodist minister, and her friend and co-worker at *The National Sex Forum*—defrauded her in any way or tricked her into signing the release. Accordingly, the plaintiffs do not object to the publication of their nude pictures in *The Sex Atlas* or in *Meditations* pursuant to this release. See footnotes 22, 25, 27.

However, the Fifth Circuit *did not* hold that Mrs. Braun was placed in a false light merely because she objected to the contents of *Chic*,[48] a "glossy, oversized, hardcore men's magazine." (726 F.2d at 247). Instead, the court took pains to describe the actual context in which Mrs. Braun's picture appeared in the "Chic Thrills" section at the beginning of the issue in question:

> "*On the same page* on which Braun's picture appeared were stories about '10 Things That P——— Off Women' with an accompanying cartoon of a woman whose large breasts are partially exposed; a story entitled 'Mammaries Are Made of This' about men whose breasts have been enlarged by exposure to a synthetic hormone, with an accompanying cartoon showing a man with large breasts; and a story entitled 'Chinese Organ Grinder' about the use of sexual organs from deer, dogs and seals as a Chinese elixir. *On the facing page* is a picture showing a nude

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[48]If the *Braun* panel had intended to hold this, it would have been obligated to distinguish—or to disapprove—numerous cases which hold that there is no right of privacy action merely because a person's photograph or name appears in a magazine whose content is objectionable to that person. See, e.g., *Ann-Margaret v. High Society Magazine, Inc.*, 498 F. Supp. 401 (S.D. N.Y. 1980); *Faucheux v. Magazine Management*, 5 Media L. Rptr. 1697 (E.D. La. 1979); *Falwell v. Penthouse International, Ltd.*, 521 F. Supp. 1204 (W.D. Va. 1981); *Handelman v. Hustler Magazine*, 469 F. Supp. 1053 (S.D. N.Y. 1978); *Goelet v. Confidential, Inc.*, 171 N.Y.S.2d 223 (N.Y. App. 1958). As stated in *Handelman*:

> "But magazines with sexually explicit text and photographs of genitalia are part of our contemporary scene. Successful candidates for the presidency of the United States consent to interviews in magazines of the same genre as *Hustler*. We think that Plaintiff is not entitled to damages merely because there is an oblique reference to him in a magazine which he believes to be in bad taste." (469 F. Supp. at 1060).

> female model demonstrating navel jewelry and an article on 'Lust Rock Rules' about a 'throbbing paean' to sex written by 'the Roman Polanski of rock.' *The cover* of the issue shows a young woman sitting in a chair with her shirt open so as partially to reveal her breasts, one hand to her mouth and the other hand in her tightly-fitting, unzipped pants." (726 F.2d at 248) (emphasis added).

The *Braun* opinion also noted that, of the twenty-one vignettes included in the "Chic Thrills" section, most of these "either concerned sex overtly or were accompanied by a photograph or cartoon of an overtly sexual nature" —and concluded *"this is the context in which Mrs. Braun's picture was published."* (726 F.2d at 247).

In contrast to *Braun*, the nude pictures of the plaintiffs in *Hustler* appear— not in a section devoted to photographs or cartoons "of an overtly sexual nature"[49]—but in a legitimate *book review* and in a long *excerpt* from a serious educational text on sexuality. In particular:

> (i) In the November 1978 *Hustler*, the plaintiffs' picture is part of a two-page book review of *Mediations on the Gift of Sexuality*. The two pages face each other, and they contain nothing but nude pictures from *Meditations* and the reviewer's comments about that book.
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> (ii) In the December 1978 *Hustler*, the plaintiffs' picture is part of a 5000-word excerpt from *The Sex Atlas*. The excerpt begins on page 71 and continues on two facing pages (72 and 73). The nude

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[49]Like the "Chic Thrills" section described in *Braun* (726 F.2d at 247-248), or the monthly "Beaver Hunt" section of *Hustler* described in *Wood v. Hustler Magazine*, 736 F.2d at 1086, 1089, 1092.

> picture of the plaintiffs is on one of these two facing pages (73)——and they contain nothing but nude pictures of children and adolescents from *The Sex Atlas* and the discussion taken from that book.[50]

Therefore, although there is certainly other material in the two *Hustler* issues which is sexually explicit and offensive (see footnotes 5, 10, 11 and 13), the specific context in which the nude pictures of the plaintiffs appear is the very same context in which these identical pictures appeared in *The Sex Atlas* and *Meditations*.

(ii) *the false light claims*

In *Braun*, the picture which *Chic* had fraudulently obtained—and which depicted the novelty act that Mrs. Braun performed with "Ralph, The Diving Pig" at Aquarena Springs, a family amusement park—was published in the context of the "Chic Thrills" section and its numerous photographs and cartoons "of an overtly sexual nature." (726 F.2d at 247). Therefore, as the Fifth Circuit held (and as the jury found), the "complained-of" publication was capable of conveying "derogatory or false meaning" because:

> (i) the ordinary reader could form an unfavorable opinion about the character of Mrs. Braun (i.e., that she was unchaste or promiscuous); or

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[50]As discussed above, on the page (70) facing the beginning page (71) of *The Sex Atlas* excerpt, there is a non-sexual cartoon and part of a supposedly humorous article about necrophelia. And, *The Sex Atlas* excerpt continues on pages 86 and 122-24 of the December 1978 *Hustler*, but these pages do not contain sexual photographs or cartoons like the "Chic Thrills" section of *Chic* or the "Beaver Hunt" section of *Hustler*. *Braun*, 726 F.2d at 247, 248; *Wood*, 736 F.2d at 1086.

(ii) the ordinary reader could assume that Mrs. Braun approved the opinions expressed in *Chic* or that she had consented to the publication of her picture in *Chic*. (726 F.2d at 254, footnote 11).[51]

However, this is not true with respect to the nude pictures of the plaintiffs in *Hustler*. Since these photographs were simply part of the book review of *Meditations* and the excerpt from *The Sex Atlas*, no ordinary reader could *reasonably* assume:

(i) That these five and seven year old children were unchaste or promiscuous, or had unfavorable character, merely because their nude pictures appeared in two serious scientific texts about sexuality;

(ii) that children of this age approved, or even knew about, the sexual acts and lifestyle depicted throughout *Hustler* merely because they were in legitimate books reviewed and excerpted in *Hustler;* or

(iii) that these minors, instead of their parents, consented to the publication of their nude pictures in *Hustler* or, for that matter, in *Meditations* and *The Sex Atlas*.[52]

Indeed, one who read the book review and the *Sex Atlas* excerpt could, at most, form an unfavorable opinion *about the parent* who consented to the publication of the

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[51]Similarly, in *Wood*, the Fifth Circuit held that "Hustler's publication falsely represented that LaJuan consented to the submission and publication" of her nude photograph in the "Beaver Hunt" section, and that the caption under the picture "falsely attributed a lewd fantasy to LaJuan." (736 F.2d at 1086, 1089).

[52]See, for example, *O'Brien v. Pabst Sales Co.*, 124 F.2d 167, 169-70 (5th Cir. 1942) (All-American football player not placed in a false light because of his picture on the 1939 Pabst Beer calendar because "there was no representation or suggestion of any kind" that O'Brien was a beer drinker or was endorsing Pabst).

nude pictures of her children—either because she approved the use of the pictures in *The Sex Atlas* and *Meditations* (see footnotes 13, 26), or because she might approve the contents of *Hustler,* or because she failed to guard against the publication of her children's pictures in a magazine like *Hustler.*[53] However, the mother/next friend does not seek any damages on her behalf, and she cannot recover damages for the plaintiffs because "Texas does not recognize a relational or derivative right of privacy." *Wood v. Hustler Magazine,* 736 F.2d at 1087.

Therefore, the publication of the plaintiffs' nude pictures in *Hustler,* in the context of the book review of *Meditations* and *The Sex Atlas* excerpt, is not capable of conveying "derogatory or false meaning" about the plaintiffs. Accordingly, their "false light" claims are baseless.[54]

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[53]Actually, the mother/next friend, Linda Fredrickson, was in the nude picture which appeared in the November 1978 *Hustler.* And, she was given credit in the December 1978 *Hustler* (p. 7) for her nude photographs of two adolescents which appeared in *The Sex Atlas* excerpt in the December 1978 *Hustler.*

[54]*Public Figures:* Hustler claims that, because the plaintiffs' nude pictures appeared in *The Sex Atlas* and *Meditations,* they are "public figures" for purposes of its first amendment protection under *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974). This is not correct. The limited public exposure "does not suffice to expose [the plaintiffs] to the increased burdens and lessened protections of those who fall within the *Gertz* standard." *Braun v. Flynt,* 726 F.2d at 249-50.

Newsworthy Event: Hustler also claims that the accurate reporting of a newsworthy event cannot constitute an invasion of privacy. *Time, Inc. v. Hill,* 358 U.S. 374 (1976). Although this is correct, there is a fact question under the present sum-

(Continued on following page)

b. *The Claimed Disclosure of Private Facts*

The plaintiffs also contend that the publication of their pictures in *Hustler* invaded their right to privacy by disclosing the highly private facts of their nude appearance. Under Texas law:

> "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public."

Restatement (Second) of Torts § 652(d); *Wood v. Hustler Magazine*, 736 F.2d at 1089.

However, this applies only to *private* facts. There is no "liability when the defendant merely gives further publicity to information about the plaintiff which is already public" or where the publicity involves matters that "the plaintiff himself leaves open to the public eye." Restatement (Second) of Torts § 652D, comment c; *Virgil v. Time, Inc.*, 527 F.2d 1122, 1125 (9th Cir. 1975), *cert. denied*, 425 U.S. 998(1976); *Wood*, 736 F.2d at 1089, footnote 1; *cf. Vitale v. National Lampoon, Inc.*, 449 F. Supp. 442, 445 (E.D. Pa. 1978).

(Continued from previous page)

mary judgment record as to whether the review of *Meditations* in the November 1978 *Hustler* and *The Sex Atlas* excerpt in the December 1978 *Hustler* were accurate "reporting" of "newsworthy events." See *Diaz v. Oakland Tribune*, 139 Cal. App.3d 118, 118 Cal.Rep. 762 (Cal. App. 1983); Def. Exhs. 12-15, 25-28.

In this case the plaintiffs—with the consent and participation of their mother/next friend—voluntarily posed for nude pictures which were to be published. They cannot seriously claim now that these nude protographs are part of their "highly private life."[55] Indeed, these very pictures first appeared in *The Sex Atlas* and in *Meditations*. At least 67,250 hardcover and 9,900 paperback copies of the *Sex Atlas* have been sold and distributed to the public. Therefore, unlike the wife in *Wood v. Hustler*, the fact of the plaintiffs' nude appearance is no longer "a highly private fact." Instead, the nude pictures of the plaintiffs—showing their appearances when they were seven and five—may be viewed today in bookstores or libraries by anyone so inclined.

Moreover, unlike the couple in *Wood*,[56] the plaintiffs have never attempted to hide their nude photographs from their family and friends. At one time, both parents proudly displayed one of the nude pictures of the plaintiffs and their mother/next friend. And, *The Sex Atlas* was openly displayed in their living room, and the plaintiffs routinely showed their nude pictures in it to friends visiting in the home.

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[55]In *Wood v. Hustler Magazine*, the husband and wife took several photos of each other in the nude in "a wilderness area"; but they "treated the photographs as private material, not showing them to anyone else and keeping them out of view in a drawer in their bedroom." The nude pictures of the wife, LaJuan, became public only when they were stolen by a neighbor and fraudulently submitted to *Hustler* for publication in its "Beaver Hunt" section. (736 F.2d at 1085).

[56]And unlike the convicted hijacker in *Briscoe v. Reader's Digest Association*, 483 P.2d 34 (Cal. 1971), who took pains to hide his criminal record from his family and friends, and who was successful for years.

Therefore, the claims based upon the disclosure of "the highly private fact of the plaintiffs' nude appearance" are totally without merit.[57]

c. *The "Commercial Appropriation" Claims*

The plaintiffs contend that *Hustler*, by publishing their nude pictures in the November and December 1978 issues, misappropriated their likeness for its own commercial advantage. Under Texas law:

> "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of privacy."

Restatement (Second) of Torts § 652C; *Kimbrough v. Coca-Cola/USA*, 521 S.W.2d 719 (Tex.Civ.App.—Eastland 1975).

However, mere publication of a person's likeness in a commercial newspaper or magazine does not create a cause of action for misappropriation. Restatement (Second) of Torts § 652C, comment d; *Ann-Margret v. High Society Magazine*, 498 F. Supp. 401, 406 (S.D. N.Y. 1980).

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[57] *Identification of Plaintiffs:* Hustler claims that the plaintiffs—who are now ten years older than they were when the nude pictures were made—have no right of privacy actions for either "public disclosure" or for "false light" because (i) they were not named or identified in *Hustler*, and (ii) they cannot be identified from those nude photographs. However, the plaintiff in *Braun* recovered for the invasion of her privacy even though she was not identified by name in the "Chic Thrills" section. (726 F.2d at 247-48). Moreover, the summary judgment record contains no other photographs of the plaintiffs showing how they appear now (or did appear at other relevant times). Consequently, there is a fact question as to whether the plaintiffs can be recognized from the nude pictures in *Hustler* for purposes of their "false light" and "public disclosure" claims. *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821, 826-27 (9th Cir. 1974).

The public must be able to identify the person from the photograph or drawing—and the defendant must have capitalized upon the likeness of that person in order to sell more magazines or newspapers. *National Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533, 540 (W.D. Tex. 1980) ("Hints from Heloise"); *Falwell v. Penthouse International, Ltd.*, 521 F. Supp. 1204, 1210 (W.D.Va. 1981).

In this case, the use of the plaintiffs' nude photographs in *Hustler* does not meet either requirement for liability. The two *Hustler* issues did not identify the plaintiffs in any manner. There were no captions under the photographs, and neither the book review of *Meditations* nor *The Sex Atlas* excerpt referred to the plaintiffs, by name or otherwise. Moreover, Hustler did not exploit the photographs in a publicity campaign designed to sell more magazines. Indeed, the "preview" in the November 1978 issue for the coming excerpt from *The Sex Atlas* uses a nude picture of other children, not the plaintiffs.

Accordingly, the plaintiffs' claims of commercial appropriation are baseless.

7. CONCLUSIONS

The plaintiffs are, quite understandably, disgusted and upset by the publication of their nude pictures in *Hustler*. That magazine is tasteless, it is offensive, and it is filled with unmitigated raunch. Nevertheless, *Hustler* is protected by the First Amendment because it is not

"obscenity." *Roth v. United States,* 354 U.S. 476 (1957).[58] And, the nude pictures of the plaintiffs are not "child pornography" whether they appear in *The Sex Atlas* or in *Hustler. Ferber,* 102 S. Ct. at 3358, 3365.

This Court will not—and, indeed, should not—substitute its judgment for that of the mother/next friend, Linda Fredrickson, in raising her children. She could have refused to permit anyone to make nude pictures of the plaintiffs, she did not. She could have limited the publication of those nude pictures, but she did not. These were decisions, like so many involved in parenthood, that she determined were in the best interests of her children. Her conduct was certainly not criminal (see footnote 14)—and, without question, it did not require judicial approval by any court.

No fraud or other wrongdoing was involved when the mother/next friend executed the release covering the nude pictures of the plaintiffs. Therefore, the release is a complete defense to the plaintiffs' claims that their right of privacy was violated by the publication of the nude pictures in *Hustler.* Moreover, irrespective of the release, the right of privacy claims are baseless—because the plaintiffs were not placed in a false light by the book review or the excerpt, there was no public disclosure of private facts, and *Hustler* did not misappropriate their pictures for commercial advantage.

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[58] "Only small men are afraid of small writings." (*Pierre de Beaumarchais*). "Although the defendant may be the worst of men . . . the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected." Judge Cuthbert Pound, dissenting in *People v. Gitlow,* 234 N.Y. 132, 136 N.E. 317, 327.

Although they are seeking damages by this suit, what the plaintiffs and their mother/next friend actually want is *censorship:* they intensely dislike *Hustler* and believe that it should not exist. (LF, vol. 1 at 141-42; Pl. Exh. 12). Granted, if only matters of taste were involved, the plaintiffs would be right. However, the constitutional protections of the First Amendment—freedom of speech and of press—block these censorship efforts, as indeed they should. For if one succeeds in censoring *Hustler,* then another will most certainly attack *The Sex Atlas, Meditations,* or other scientific, medical, artistic, or literary works, because they contain pictures of nude children (see footnotes 5, 11 and 13)[59] And, the plaintiffs may not accomplish their desired censorship by disguising their efforts in traditional "right to privacy" claims or in novel requests for judicial control of "skin magazines."

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[59]Those who would be our censors are certainly not lacking either in imagination or desire. Indeed, in the "interests of our children," censors have banned *Donald Duck* and *Tarzan* comic strips from libraries in Helsinki and in Downey, California (because of the "suspect relationships" which both have had for years with females to whom they are not married) . . . they have banned *Snow White* as a school play in Chicago (because of the "racist" overtones of this fairy tale) . . . they have attacked comic books because of such things as the "psychological homosexual relationships" between such leotard-attired super heroes as *Batman* and his young ward, *Robin* . . . and they have attempted to keep J. D. Salinger's infamous *"Catch Her In the Rye"* out of our schools. See Perrin, *Dr. Bowdler's Legacy* (A History of Expurgated Books) (Antheneum 1969); and *Poisoned Paradise: the Underside of Winnie-the-Pooh,* "in *The Pooh Perplex* by Frederick C. Crews (E.P. Dutton & Co. 1963).

Censorship, "like charity, should begin at home; but unlike charity, it should end there."[60] Accordingly, this case is DISMISSED.

SIGNED this 2nd day of May, 1985.

/s/ Jerry Buchmeyer
United States District Judge

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[60]Clare Boothe Luce.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

KELLY FALOONA and BRANDON FALOONA, by their next friend, LINDA FREDRICKSON,

Plaintiffs-Appellants,

v.

HUSTLER MAGAZINE, INC.,

Defendant-Appellee.

No. 85-1359
OPINION

Filed September 15, 1986

Before: Homer Thornberry, Henry A. Politz and Carolyn Dineen Randall, Circuit Judges.

Opinion by Judge Henry A. Politz

Appeal from the United States District Court
for the Northern District of Texas
Jerry Buchmeyer, District Judge, Presiding

SUMMARY

Constitutional Law/Contracts

Appeal from summary judgment dismissing plaintiff's action. Affirmed.

Linda Fredrickson separated from her husband in 1971 and took their two children, Appellants Kelly and Brandon Faloona, from their Texas residence to California. Later that year, she obtained a final divorce decree from a California court that awarded her custody of the children. In 1972, Dr. Laird Sutton asked Fredrickson if she and her children would pose for nude photographs to be used in *The Sex Atlas,* a textbook on human sexuality. Fredrick-

son agreed, and Sutton took a series of photographs. Kelly and Brandon were then six and four, respectively. In 1973, more pictures were taken and Fredrickson executed two photographic release forms, one for herself and the other on behalf of her children. The releases provided that Sutton was free to use the photographs in any manner he saw fit and that Fredrickson retained no rights whatsoever in the photographs. *The Sex Atlas* was published in 1977, the text of which contained a number of photographs of Kelly and Brandon. Also published in 1977 was *Meditations on the Gift of Sexuality*, a book that contained a nude photograph of Fredrickson and her children. Prior to this publication, Sutton had obtained Fredrickson's permission to publish the photograph. In December 1977, Fredrickson and her children returned to Texas. In 1978, Appellee Hustler Magazine, Inc., publisher of *Hustler*, purchased the right to publish an excerpt and accompanying photographs from *The Sex Atlas*. The November 1978 issue contained a two-page book review of *Meditations*, with six photographs from the book, including the picture of Fredrickson and her children. The December 1978 issue of *Hustler* contained the excerpt from *The Sex Atlas* and was illustrated with ten photographs from the book, including a small photograph of Kelly and Brandon. Thereafter, Fredrickson, as the minors' next friend, filed suit against *Hustler* seeking damages for invasion of privacy and an order voiding the photographer's release. The district court granted summary judgment to Hustler Magazine, Inc. and dismissed the action.

[1] As to the release, the relevant factors predominate in favor of the application of California law. The contract was negotiated and executed there, to be performed by

resident Californians. In addition, Fredrickson was empowered to act on behalf of the minors by virtue of California law and the divorce decree. [2] As to the invasion of privacy, however, Texas law is applicable. [3] In their effort to void the release, appellants argue that California law permits them to disaffirm the release at any time and that it requires judicial approval of any photographic release before the nude photograph of a child may be published. [4] However, the cases relied upon to establish that a chose in action cannot be released by a parent are inapt as are the cases showing that a minor may void a contract executed during minority; the children had no chose in action against *Hustler* at the time the release was signed, and the release was not signed by the minors. [5] Moreover, no California law suggests that the court should be involved in the authorizing of photographs of minors. Thus, the release given by Fredrickson was valid when given and valid when used. [6] Next, appellants argue that the publications in *Hustler* tortiously disclosed private facts, not of legitimate concern to the public, in a manner that would be highly offensive to a reasonable person. However, the tortious disclosure of private facts applies only to *private* facts. Here, because the photographs had been widely published elsewhere, *Hustler* revealed no *private* facts. [7] Appellants also contend that *Hustler* invaded their privacy by placing them before the public in a false light. They argue that the publication of their nude photographs in *Hustler* insinuates that they are willing to appear naked in *Hustler* and that they endorse and support the magazine. [8] In this connection, they contend that the district court erred in reviewing the photographs within the confines of the book review and the excerpt in which

they appeared rather than in the context of the entire issue of *Hustler*. [9] However, no reasonable person could consider the photographs as indicating appellants' approval of *Hustler* or that they were willing to pose nude for *Hustler*. It is obvious that the photographs were reproductions from the books being reviewed or excerpted. No tie to *Hustler* is claimed or suggested. This sharp distinction of context distinguishes this case from ones in which entire magazines were reviewed to determine if a false light invasion of privacy occurred. So viewed, as a matter of law, the instant pictures are not offensive and the district court correctly dismissed the false light invasion of privacy claim.

OPINION

HENRY A. POLITZ, Circuit Judge:

Plaintiffs appeal the summary judgment dismissal of their action against Hustler Magazine, Inc., publisher of *Hustler*. The minors Kelly and Brandon Faloona, through their mother, Linda Fredrickson, filed suit to void a photographic release executed by their mother, and for damages for invasion of privacy against Hustler Magazine, Seabury Press and Dr. Erwin J. Haeberle. On the eve of the trial, in a comprehensive and scholarly opinion, the district court granted summary judgment to Hustler Magazine, which was by then the sole remaining defendant. *Faloona by Fredrickson v. Hustler Magazine, Inc.*, 607 F.Supp. 1341 (N.D.Tex. 1985). We affirm.

Background

The facts are thoroughly reviewed in the district court's opinion, 607 F.Supp. at 1346-52, and we only summarize the salient points

In 1971 Fredrickson separated from her husband, Gerald Faloona, and took their two children, Kelly and Brandon, then ages five and three, respectively, from their Dallas, Texas residence to San Francisco, California. Later that year she secured a final divorce decree from a California court. That decree awarded her the care, custoday, and control of the minor children.

In September 1972, while working as a psychiatric nurse, Fredrickson attended a course on "sexual attitude restructure" at the National Sex Forum, an institute on human sexuality in San Francisco. Shortly thereafter, Dr. Laird Sutton, a Methodist minister who headed the audio-visual department of the National Sex Forum, asked Fredrickson if she and her children would pose for nude photographs to be used in *The Sex Atlas,* a textbook on human sexuality then being written by Dr. Erwin J. Haeberle, a sexologist affiliated with the Forum. Fredrickson agreed, after discussing the matter with the children and their father. In late 1972 Sutton took a series of photographs at the studio in his home. Kelly and Brandon were then six and four, respectively. Fredrickson was paid $100 for the photographs. National Sex Forum did not use these photographs. Fredrickson and Gerald Faloona privately displayed them.

In mid-1973, after Fredrickson began working for the National Sex Forum, Sutton took more photographs. No

compensation was paid. Fredrickson executed two identical photographic release forms for Sutton, one for herself and the other on behalf of her two children. *See* 607 F. Supp. at 1348 & n.21. The forms, which were read and fully understood by Fredrickson, provided in pertinent part:

> That one of the terms of employment was that [Sutton] was free to use the photographs in any manner [he] deemed fit, whether by sale to the general public, sale to a limited audience, or no sale at all.
>
> That [Sutton] has made no representation to [Fredrickson] as to distribution of the photographic representation, or any use [Sutton] may make of said representation.
>
> That [Fredrickson] retains no rights whatsoever to the photographic representation or to the literary or artistic product in which the photographic representation is an integral part, and hereby, for a valuable consideration, releases and indemnifies [Sutton] from and against any and all claims [Fredrickson] may make in the future against [Sutton] or [his] assigns resulting from said employment.

The Seabury Press purchased the rights of Dr. Haeberle and the National Sex Forum and published *The Sex Atlas* in 1977. The text contained full-page photographs of Kelly and Brandon, a double page photograph of Brandon, and eleven small photograpns of the two children together.

Also in 1977, the National Sex Forum published a book entitled *Meditations on the Gift of Sexuality,* which contained a nude photograph of Fredrickson and the two minors. Prior to publication, Sutton sought and secured Fredrickson's permission to publish the photo, although Fredrickson apparently was unaware of the particular photo he planned to use. After publication of *Meditations,*

Fredrickson informed the author, a Methodist minister and another of the National Sex Forum officials, that the Forum should not use any more photographs of her or the children without first contacting her.

In December 1977 Fredrickson and the two children departed San Francisco and returned to Dallas where Gerald Faloona had continued to reside.

In the summer of 1978, *Hustler* became interested in publishing a book review of *Meditations* and an excerpt from *The Sex Atlas.* It purchased from Seabury Press the right to publish a 5,000-word excerpt and accompanying photographs from *The Sex Atlas.* The November 1978 issue contained a two-page book review of *Meditations,* with six photographs from the book, including the picture of Fredrickson and her two children. In that same issue, *Hustler* announced that an excerpt and photographs from *The Sex Atlas* would be published in its December 1978 issue. Plaintiffs learned that their picture was in the November issue, and of the plans for the December issue, when a friend showed Fredrickson a copy of the November issue of *Hustler.* On October 25, 1978, Fredrickson's attorney wrote *Hustler* and demanded that no photographs accompany *The Sex Atlas* excerpts. The hour was late; the December issue was already off the presses and was mailed two days later.

The Sex Atlas excerpt was illustrated with ten photographs from the book, including one of the small photographs of Kelly and Brandon. In that picture they are standing next to each other. Brandon, facing forward, appears to be walking towards the photographer. Kelly stands facing her brother.

In 1979 Fredrickson, as the minors' next friend, filed the instant suit against *Hustler,* Seabury Press, and Haeberle, seeking for each $2.5 million in actual damages and $7.5 million in punitive damages. In addition to damages, the complaint seeks to void the photographer's release. During ensuing proceedings, Seabury Press and Haeberle were dismissed from the suit, leaving *Hustler* the only defendant as the matter neared trial.

Analysis

Choice of Law

At the threshold in this diversity jurisdiction case, we must determine applicable law by applying Texas choice-of-law rubrics. *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487 (1941); *Atlantic Mutual Ins. Co. v. Truck Ins. Exchange,* — F.2d —, slip op. 8818 (5th Cir. 1986). Doing so, we agree with the district court that Texas law governs the invasion of privacy issue. We disagree with the district court, however, and conclude that California law should be used to determine the validity of the photographer's release.

Where the parties have not agreed to the contrary, in contract cases Texas has adopted the "most significant relationship" test of Section 6 of the *Restatement (Second) of Contracts (1971). Duncan v. Cessna Aircraft Co.,* 665 S.W.2d 414, 421 (Tex. 1984). In such instances,

> the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement (Second) of Conflicts of Law § 188(2). The capacity of a party to contract is determined under the same principles. *Restatement (Second) of Conflicts of Law* § 198. *See generally* Comment, *Texas Contract Choice of Law Rules After Duncan v. Cessna Aircraft Company,* 36 Baylor L.Rev. 491 (1984).

[1] We are persuaded that as to the release issue the relevant factors predominate in favor of the application of California law. The contract was negotiated there, executed there, to be performed there, by resident Californians. In addition, Fredrickson was empowered to act on behalf of the minors by virtue of the laws of California and the divorce decree by a California court which granted her the care, custody, and control of the minors. At the time of the execution of the release, at the time of publication of the *Atlas* and *Meditations,* and until the children returned to Texas sometime thereafter, the California court retained judicial oversight of the minors.

[2] As to the claims for false light invasion of privacy, we agree with the district court that Texas law is

applicable under §§ 6, 145, and 153 of the *Second Restatement, see Gutierrez v. Collins,* 583 S.W.2d 312 (Tex. 1979), for the reasons stated in 607 F.Supp. at 1352 (*citing Wood v. Hustler Magazine, Inc.,* 736 F.2d 1084 (5th Cir. 1984), *cert. denied,* — U.S. —, 105 S.Ct. 783, 83 L.Ed.2d 777 (1985)); *accord Ritzmann v. Weekly World News, Inc.,* 614 F.Supp. 1336 (N.D.Tex. 1985).

Standard of Review

Summary judgment is appropriate where the material facts are not disputed and the decision turns on purely legal considerations. Fed.R.Civ.P.56; *Fontenot v. Upjohn Co.,* 780 F.2d 1190 (5th Cir. 1986). The moving party must demonstrate by competent evidence that no genuine issue of material fact exists. *Id.; Galindo v. Precision American Corp.,* 754 F.2d 1212 (5th Cir. 1985). In determining whether a genuine issue of material fact exists, the court must draw all reasonable inferences most favorable to the party opposing the motion. *Harrison v. Byrd,* 765 F.2d 501 (5th Cir. 1985); *Southmark Properties v. Charles House Corp.,* 742 F.2d 862 (5th Cir. 1984). *See generally Anderson v. Liberty Lobby, Inc.,* — U.S. —, 91 L.Ed.2d 202 (1986).

Since the issue of the validity of the release involves the application of California law to undisputed facts, it is ripe for summary adjudication. Likewise for the invasion of privacy claim. Under Texas law, the court must make the initial legal determination whether the photographs are "capable of conveying defamatory or false meaning. . . ." *Braun v. Flynt,* 726 F.2d 245, 253 (5th Cir.), *reh'g en banc denied,* 731 F.2d 1205, *cert. denied sub nom. Chic Magazine, Inc. v. Braun,* — U.S. —, 105 S.Ct.

252 (1984). The invasion of privacy claim becomes a jury issue only after the court concludes that a false meaning reasonably may exist. *Golden Bear Distributing Systems of Texas, Inc. v. Chase Revel, Inc.*, 708 F.2d 944 (5th Cir. 1983) (applying Texas law). In resolving this question, we must consider "the effect the [photographs may have] on the mind of the 'ordinary reader.'" 708 F.2d at 948 (citations omitted). A reversal and remand for trial is in order only if we find that the effect of the photographs on the ordinary reader is at least ambiguous.

Both issues, therefore, were before the trial court as purely legal questions. They are before this court for a *de novo* review in that same posture. *See Bose Corp. v. Consumers Union of United tSates, Inc.*, 466 U.S. 485 (1984).

Validity of the Release

[3] Plaintiffs' initial hurdle is the photographic release their mother gave to Sutton. Plaintiffs vigorously advance two arguments in their effort to void that release. They urge first the California law permits them to disaffirm the release at any time; second, they contend that even if California law does not directly dispose of the validity issue, we should require, as a matter of California law, judiciai approval of any photographic release before the nude picture of a child may be published.[1]

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[1]We emphasize, as did the district court, that the plaintiffs' photographs are not child pornography within the definition of *New York v. Ferber*, 458 U.S. 747, 764 (1982) (emphasis in original) (category of child pornography is "limited to works that *visually* depict sexual conduct by children. . . ."). Our discussion is limited strictly to the instant situation.

In rejecting plaintiffs' claims, and although it concluded that Texas law was to be applied to the release-validity issue, the district court, in its measured and careful manner, also considered California law and found the release equally valid thereunder, 607 F.Supp. at 1355. In doing so the court referred to Section 3344 of the California Civil Code, which provides:

> Any person who knowingly uses another's name, photograph, or likeness . . . without such person's prior consent, or in the case of a minor, the consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof....

The district court suggested that this provision codified the common law of California. Plaintiffs maintain that in so concluding the district court erred.

We agree with plaintiffs that § 3344 does not codify California's common law; rather it augments it. *Lugosi v. Universal Pictures, Inc.*, 25 Cal.3d 813 (1979). As noted by the district court § 3344 provides a source of guidance on California law, albeit not dispositive. We accept it as such, mindful that it applies directly to commercial misappropriation and only inferentially to false light invasion of privacy.

Plaintiffs invite our attention to numerous California decisions allowing minors to void contracts they executed, requiring judicial approval of minors' claims, and voiding parental consent terminating or compromising minors' claims. No case similar to that at bar is cited, nor has our independent research found any.

[4] Plaintiffs rely heavily on California cases holding that a chose in action is a child's personal property,

Carver v. Ferguson, 254 P.2d 44 (Cal.App. 1953), and cannot be released by a parent. *E.g., Ruddock v. Ohls,* 91 Cal.App.3d 271, 154 Cal.Rptr. 87 (1979); *State of California v. Superior Court,* 86 Cal.App.3d 475, 150 Cal. Rptr. 308 (1978). The children had no chose in action against *Hustler* or anyone else when the release was signed. It cannot therefore be gainsaid that their mother did not release a chose in action by executing the photographic release. Plaintiffs' reliance on these authorities is inapt. So too is their reliance on the established rule that a minor may void a contract executed during minority. The instant release was not signed by the minors.

We find no dispositive statutory law, common law rule, or judicial expression disposing of plaintiffs' contentions. In such a situation it is entirely appropriate for the court to refer to the body of California law for guidance as to that state's policy and, based thereon, to make an *Erie*-prediction as to how the California courts would resolve the issue. The district court so approached the matter. It relied on § 3344 for guidance. We do likewise. This statutory provision recognizes the authority of parents to consent to the photographing of their children.

[5] Our attention has been invited to no California law, and we independently have found none, which suggests that the court should be involved in the authorizing of photographs of minors, depending on the publication in which the photographs are destined to appear. We are therefore unwilling to pronounce, as urged by plaintiffs, that California law requires judicial approval of photographic releases for use of minors' photographs in a magazine such as *Hustler.* We need not and do not ad-

dress whether such approval might be required, or whether parental consent could ever be relied on, for the taking and publishing of photographs defined as pornographic by *Ferber*. We conclude that the release given by Fredrickson was valid when given and valid when used.

Invasion of Privacy

As formulated by Dean Prosser, refined by the *Restate (Second) of Torts* (1976), and adopted by Texas, the tort of invasion of the right of privacy is composed of four distinct causes of action. *See Wood v. Hustler Magazine, Inc.; Braun v. Flynt.* Plaintiffs argue that their claims fall under three of these four causes of action: disclosure of private facts, commercial misappropriation, and placing of plaintiffs in a false light.

Finding that plaintiffs are not entitled to trial on any of these claims, we need not determine whether the release precludes their invasion of privacy action under Texas law. *See Wood,* 736 F.2d at 1089 n.1; *compare Douglass v. Hustler Magazine, Inc.,* 769 F.2d 1128 (7th Cir. 1985), *cert. denied,* — U.S. —, 89 L.Ed.2d 892 (1986).[2]

[6] Plaintiffs argue that the publication of their photographs with the book review of *Meditations* and along with the excerpt from *The Sex Atlas,* tortiously discloses private facts by giving "publicity to a matter

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[2]Because of our affirmance of the district court's finding that plaintiffs cannot maintain their invasion of privacy claim as a matter of law, we do not reach the serious first amendment issue inherent in attaching liability to the republication of photographs in a book review, or in an authorized excerpt from a publication in which the photographs appeared consensually.

concerning [their] private [lives]" which "is not a legitimate concern to the public" in a manner that "would be highly offensive to a reasonable person." *Restatement (Second) of Torts* § 652D. Plaintiffs argue that because the context in which their photographs appeared is highly offensive to a reasonable person, and because the review and excerpt could have been published without the photographs, the tort proscribed by § 652D was committed. Plaintiffs ignore the obvious, succintly stated by the district court: the tortious disclosure of private facts "applies only to *private* facts." 607 F.Supp. at 1359 (emphasis in original) (*citing* comment c to § 652D). Since the photographs printed in *Hustler* had already been widely published elsewhere, *Hustler* revealed no *private* facts.

Plaintiffs next contend that *Hustler* misappropriated their likeness for commercial advantage. This claim is rejected for the reasons given by the district court. 607 F.Supp at 1360.

[7] Finally, the plaintiffs contend that the publication of the photographs in *Hustler* was a tortious invasion of their privacy because it placed them "before the public in a false light." *Restatement (Second) of Torts* § 652E. Plaintiffs argue that the publication of their nude photographs in *Hustler* insinuates that they are willing to appear naked in *Hustler* and that they endorse and support the magazine.

[8] The law of false light invasion of privacy has recently been exhaustively canvassed by our Seventh Circuit colleagues in *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985), *cert. denied* — U.S. —, 89

L.Ed.2d 892 (1986). We have reviewed Texas law on the subject in both *Wood* and *Braun*. Plaintiffs contend that because the context in which the pictures appeared is critical to the determination whether they have been placed in a false light, the district court erred in granting summary judgment on this claim. Plaintiffs maintain that the relevant context in which to review their false light claim is the entire issue of *Hustler*. The district court reviewed plaintiffs photographs within the confines of the book review and the excerpt in which they appeared.

As we earlier noted, the initial decision whether the photographs may be taken as portraying plaintiffs in a false light is exclusively for the court. Any uncertainty in this initial step should be resolved in favor of the plaintiffs. Generally, the first step will require a review of the entire magazine to place the alleged false light invasion of privacy in perspective. Thus it was in *Douglass*, where plaintiff appeared in a nude photo-spread in *Hustler*. While we were primarily concerned in *Wood* with plaintiff's failure to consent, we did review the false light claim, focusing on the "nature of the material published in the Beaver Hunt section" of *Hustler*. 736 F.2d at 1092. In *Braun* we required that the entire magazine, *Chic*, a sister publication of *Hustler*, be introduced in evidence to allow the jury to determine the context of the alleged false light invasion of privacy. As the court *a quo* astutely observed, however, our inquiry surrounding the context within which the photograph there appeared was focused on the "Chic Thrills" section of *Chic* in which it was published. We did not evaluate the entire magazine. *See* 607 F.Supp. at 1356-57 (*discussing Braun*, 726 F.2d at 247).

[9] Reviewing the context in which plaintiffs' photographs appeared in *Hustler,* carefully described by the district court, 607 F.Supp. at 1350-51 & 1357-58, we agree with the trial judge that no reasonable person could consider the photographs as indicating plaintiffs' approval of *Hustler,* or that they were willing to pose nude for *Hustler.* It is obvious that the photographs were reproductions from the books being reviewed or excerpted. No tie to *Hustler* is claimed or suggested. It is this sharp definition of context which distinguishes this case from *Douglas, Wood,* and *Braun.* So viewed, as a matter of law the instant pictures are not offensive, albeit the issues of *Hustler,* as a whole, are manifestly offensive. The district court correctly found that plaintiffs were not entitled to submit their false light invasion of privacy claims to the jury.

For these reasons, the judgment of the district court dismissing plaintiffs' claims is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1359

D.C. Docket No. CA-3-79-0056-R

KELLY FALOONA and BRANDON FALOONA, by their next friend, LINDA FREDRICKSON,

Plaintiffs-Appellants,

versus

HUSTLER MAGAZINE, INC.

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

Before THORNBERRY, POLITZ and RANDALL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

September 15, 1986

ISSUED AS MANDATE: OCT. 24, 1986

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1359

KELLY FALOONA and BRANDON FALOONA, by their next friend, LINDA FREDRICKSON,

Plaintiffs-Appellants,

versus

HUSTLER MAGAZINE, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

(Filed October 14, 1986)

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 9-15-86, 5 Cir., 198—, ——F.2d——)

(OCTOBER 14, 1986)

Before THORNBERRY, POLITZ and RANDALL, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel re-

hearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

CLERK'S NOTE: SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.